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## When Genealogy Matters: Intercountry Adoption, International Human Rights, and Global Neoliberalism

Barbara Stark

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# When Genealogy Matters: Intercountry Adoption, International Human Rights, and Global Neoliberalism

Barbara Stark\*

## ABSTRACT

*"Those who believe in children's human rights need to promote children's basic human right to be liberated from the conditions under which they live in orphanages or on the street and to grow up with parents who can provide the loving nurturing that is essential for human flourishing."*

-- Elizabeth Bartholet<sup>1</sup>

*"In short, there is a struggle for the soul of the human rights movement, and it is being waged in large part through the proxy of genealogy."*

-- Philip Alston<sup>2</sup>

*"[A]doption, while a practice that affects a small and shrinking number of people, has been important to national and international politics out of all proportion to its numerical significance."*

--Laura Briggs<sup>3</sup>

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1. Elizabeth Bartholet, *International Adoption: The Human Rights Issues*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 94, 106 (Michele Bratcher Goodwin ed., 2010) [hereinafter *International Adoption*].

2. Philip Alston, *Does the Past Matter?*, 126 HARV. L. REV. 2043, 2077 (2013).

3. LAURA BRIGGS, *SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION* 5 (2012). As the author explains, "Symbolically and actually, the politics of adoption and what happens to the children of vulnerable populations,

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usually single mothers, have been critical to . . . human rights, and the Cold War and its political and economic aftermath." *Id.*

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## I. INTRODUCTION

Genealogy isn't what it used to be. Once genealogy was the route to "legitimacy," whether literally—a "*fillius nullius*," a child of no one,<sup>4</sup> was illegitimate, a bastard—or more fancifully—a tastefully mounted family crest could be obtained for virtually any surname, for a price.<sup>5</sup> Or genealogy referred to the painstaking search for roots, the recovery of a personal history, the excavation of a trajectory that would give meaning to the present.<sup>6</sup>

But we are all legitimate now.<sup>7</sup> And DNA testing provides more information than anyone can process, including, for some, the refutation of cherished ancestral myths,<sup>8</sup> a good chance of developing

4. See DOUGLAS E. ABRAMS ET AL., *CHILDREN AND THE LAW IN A NUTSHELL* 48 (5th ed. 2001) (noting that "[e]arly in the nineteenth century, Chancellor James Kent stated the harsh common law doctrine this way: 'A bastard being in the eye of the law *nullius filius* [child of no one], . . . he has no inheritable blood, and is incapable of inheriting as heir, either to his putative father, or his mother, or to anyone else, nor can he have heirs but of his own body'" (quoting JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (5th ed. 1844)). It was usually quite clear who the child's mother was.

5. It still can be.

6. See Neil Genzlinger, *In TV's Mania For Ancestry, Both Inanity and Insight*, N.Y. TIMES, Apr. 2, 2016, at C1 (describing four different television series based on genealogical searches, including an "improbable-sounding genealogical competition show"); see, e.g., *Finding Your Roots With Henry Louis Gates*, PBS, <http://www.pbs.org/weta/finding-your-roots/about/about-series/> [<https://perma.cc/9BZ9-LPK7>] (archived Nov. 7, 2017).

7. See General Comment 17 §5, U.N. Doc. HR1/Gen/1/Rev.5 (2001) (suggesting that art. 24(1) of the ICCPR prohibits discrimination between marital and non-marital children); Convention on the Rights of the Child, at 167, U.N. Doc. A/44/49 (1989) [hereinafter CRC].

8. See Elizabeth Bernstein, *Genealogy Gone Haywire As Searchers Take to Web*, WALL ST. J., June 15, 2001, at W1 (describing surprises in store for those embarking on genealogical searches).

a terrible disease,<sup>9</sup> and even Neanderthals in the family tree.<sup>10</sup> Genealogy is risky business. It remains a threshold issue in intercountry adoption, however, in which voluntary surrender by the birth parents is a prerequisite for a valid adoption.<sup>11</sup>

There are more babies and children in orphanages, so-called orphanages, on the street, on the market, or on their own than ever before. Yet intercountry adoptions have declined to levels not seen since the Hague Convention on Intercountry Adoption came into force.<sup>12</sup> Some see this as a tragedy.<sup>13</sup> Others view it as a positive development. Somewhat surprisingly, everyone seems willing to decide the matter by the same standard—"human rights"<sup>14</sup>—although there is less agreement as to what this means.

This reflects the ongoing "struggle for the soul of the human rights movement," as Professor Philip Alston describes it, which itself "is

9. See Siddhartha Mukherjee, *Runs in the Family*, NEW YORKER, Mar. 28, 2016 (discussing new findings about the genetics of schizophrenia, which runs in his family).

10. See *The Genographic Project, Why Am I Neanderthal?*, NAT'L GEOGRAPHIC, <https://genographic.nationalgeographic.com/neanderthal/> (last visited Oct. 23, 2017) [<https://perma.cc/ZYV7-Y9WV>] (archived Oct. 23, 2017) (explaining why "everyone living outside of Africa today has a small amount of Neanderthal in them").

11. Hague Conference on Private International Law: Convention on Protection of Children and Co-operation in Respect to Intercountry Adoption, *opened for signature* May 29, 1993, 1870 U.N.T.S. 182, <http://www.hcch.net/e/conventions/text33e.html> [<https://perma.cc/BXR8-SJVA>] (archived Oct. 23, 2017). For a detailed analysis, see Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L. J. 243 (1994); see also G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, <http://www.hcch.net/e/conventions/expl33e.html> (last visited Dec. 24, 2017) [<https://perma.cc/RV4R-AYMC>] (archived Oct. 23, 2017) (discussing the effect of the Hague Convention on intercountry adoptions following its ratification).

12. See Hague Conference on Private International Law: Convention on Protection of Children and Co-operation in Respect to Intercountry Adoption, *opened for signature* May 29, 1993, 1870 U.N.T.S. 182, <http://www.hcch.net/e/conventions/text33e.html> [<https://perma.cc/BXR8-SJVA>] (archived Oct. 23, 2017) (referencing how current conditions do not totally reflect those at the time of enactment of the Hague Convention on Intercountry Adoption).

13. See *International Adoption*, *supra* note 1, at 95 (discussing how international children's human rights organizations changed the focus of the Hague Convention negotiations from the goal of facilitation of adoptions to prevention of adoption abuses).

14. See, e.g., *id.*; D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349 (2005); Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L. J. 179 (2003); Shani M. King, *Owning Laura Silsby's Shame: How the Haitian Child Trafficking Scheme Embodies the Western Disregard for Poor Families*, 25 HARV. HUM. RTS. J. 1 (2012); David M. Smolin, *The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties*, 2013 UTAH L. REV. 1065 (2013); *International Adoption*, *supra* note 1; Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century: Global Trends from 2001 to 2010*, in INTERCOUNTRY ADOPTION 7 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012).

being waged in large part through the proxy of genealogy.”<sup>15</sup> As Professor Wendy Brown shows, moreover, this struggle is playing out within an increasingly hegemonic neoliberalism that drives both the globalization of adoption and the backlash against it.

This Article traces the genealogies of intercountry adoption, human rights, and neoliberalism and explains how they converge. Part I examines adoption genealogies, noting that “stranger” adoption *erases* genealogy, eliminating the legal and social consequences of an illegitimate birth and giving the child a new legal identity. “Genealogy” here is not a scientific fact, a matter of DNA, but a social and legal construction. Part I begins with brief accounts of the “huge influx of children of color into the child welfare system”<sup>16</sup> in the United States and shows how domestic transracial adoption created the template for intercountry adoption. This Part then describes the globalization of adoption after World War II, including the paradox of “saving” children by sending them away, and the futility of erasing genealogy when it is as plain as the nose on a child’s face, or the shape of her eyes, or the color of her skin.

Part II sets out the genealogies of the human rights that should govern adoption and explains why, for the most part, they do not. As Professors Alston and Jenny Martinez have explained, human rights demand a “polycentric” understanding.<sup>17</sup> There are multiple human rights instruments and multiple human rights movements, and they overlap and build on each other in complicated ways. These include a rich genealogy of children’s rights as well as the story of a “world made new” after World War II.<sup>18</sup> The entire array of human rights has been challenged, however, its intricate networks sliced through in favor of a new pop-up conception of human rights that emerged “seemingly from nowhere” in the 1970s.<sup>19</sup>

Part III zooms out from the intimate scale of intercountry adoption, and the broader but still insistently human scale of human rights, to situate the preceding genealogies within the massive project of globalized neoliberalism. It tracks the genealogy of neoliberalism, from its intellectual origins in the Mont Pelerin Society, through the

15. Alston, *supra* note 2, at 2077.

16. BRIGGS, *supra* note 3, at 7.

17. See Alston, *supra* note 2, at 2077 (discussing the development of human rights from its origins until present day); Jenny S. Martinez, *Human Rights and History*, 126 HARV. L. REV. FORUM 221 (2013) (a response to Alston, *Does the Past Matter?*, *supra* note 2). Adoption and neoliberalism, similarly, could usefully be understood from a polycentric perspective, but this is beyond the scope of this Article. I present *some* genealogies of these subjects, obviously not all.

18. The phrase is Eleanor Roosevelt’s. See, e.g., MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2002).

19. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 3 (2010).

“gyrations and chaotic experiments”<sup>20</sup> of the Washington Consensus, up through the global recession and the shaky recovery.

Part IV explains when, and why, genealogy matters in these contexts. Genealogy matters, for example, when the Haitian orphans “rescued” after the earthquake turned out not to be orphans at all.<sup>21</sup> It matters when the affluence of the industrialized West is conflated with “human rights” to which all must aspire.<sup>22</sup> It matters in this time of unprecedented inequality, when, as Thomas Piketty has shown, birth predicts wealth as certainly as it did during the Gilded Age.<sup>23</sup> This Part concludes that genealogy matters now because it reminds us where we come from and how we got here, exposing “what currently remains hidden in plain sight,”<sup>24</sup> as Professor Susan Marks puts it; that is, the runaway train of global capitalism,<sup>25</sup> which commodifies everything in its path, including babies and human rights.<sup>26</sup>

## II. ADOPTION GENEALOGIES

When parents cannot care for their infants, another member of the family or community usually steps up. According to historian Peter Conn, adoption is ancient, and, if not universal, well documented across time,<sup>27</sup> space,<sup>28</sup> and species.<sup>29</sup> But legal adoption by strangers, in which all ties to the family of origin are severed, is relatively rare and relatively recent. Although Conn cites examples of heirs selected

20. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 13 (2005).

21. See *infra* Part I.B.1.

22. See *infra* Part IV.A.1.a.

23. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 408–09, 421 (2014).

24. Susan Marks, *Four Human Rights Myths* 16–17 (LSE Law, Society and Economy Working Papers 10/2012, 2012).

25. This Article eschews the euphemistic use of the terms ‘free markets’ or ‘economic freedom’ in view of their genealogy: at a meeting in the United States of the Republican Governors Association, held in late 2011, Republican Party officials asked their candidates not to use the word ‘capitalism’. “We’re replacing it with either ‘economic freedom’ or ‘free market,’” explained one strategist. He continued: “The public . . . still prefers capitalism to socialism . . . [but] if we’re seen as defenders of quote, Wall Street, end quote, we’ve got a problem.” *Id.* at 14.

26. Some have argued that this might have a bright side. See, e.g., Martha Ertman, *The Upside of Baby Markets*, BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 23 (Michele Bratcher Goodwin ed., 2010) (arguing that “market mechanisms present a different moral vision, which gives priority to liberty and innovation, rather than to tradition and divine or biological mandates” in support of gamete markets to allow LGBT reproduction).

27. See PETER CONN, ADOPTION: A BRIEF SOCIAL AND CULTURAL HISTORY 27 (2013) (providing anecdotal accounts of adoption dating back to 1772 BCE).

28. See *id.* at 27–56 (documenting adoptions from Mesopotamia through the Middle East, China, Europe, and Oceania).

29. See *id.* at 25 (noting reports of adoptions of non-biogenetic young in over 120 mammalian and 150 avian species).

by childless men of property, this practice was condemned by the Church and became virtually unknown in Europe. The importance of blood ties, and the maintenance of family registries, discouraged the adoption of babies or children throughout Asia, with the exception of India. In Muslim states, adoption was prohibited; orphans were the responsibility of relatives under *kafalah*.<sup>30</sup>

Modern adoption is an American invention. As Professor Barbara Melosh notes:

The emergence of modern adoption required a radically different understanding of family, one that overturned deeply held beliefs about blood and nurture, obligation and love, choice and chance. It was no accident that the United States was the crucible of this kind of adoption: in its repudiation of the past and its confidence in social engineering, adoption is quintessentially American.<sup>31</sup>

Adoption is an evolving institution, changing over time as conceptions of childhood, the roles of nature and nurture, and the expectations of birth parents and adopting parents change. Like other American inventions, stranger adoption has been exported, with decidedly mixed results.

#### *A. In the United States*

Massachusetts was the first state to pass a comprehensive adoption law in 1851.<sup>32</sup> As David Papke explains, "With indentured servitude and apprenticeships no longer available for abandoned or orphaned children, adoption emerged as a viable alternative."<sup>33</sup> But legal adoption developed slowly and contentiously. Practices that epitomized enlightened care for poor children when they were instituted appall us now. Starting in the 1850s, over 250,000 children traveled on Orphan Trains from the crowded slums of the eastern cities to the "wholesome atmosphere" of Midwest and Western farms. It was hoped that they would acquire practical skills, while providing farmers with cheap labor.<sup>34</sup> In the early 1900s, adoption was often employed by

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30. "[W]hile it forbids adoption, the Quran expressly commends the care of orphans. These children should be valued, protected, and treated in all respects except name and inheritance as a non-adoptive son or daughter. Thus, *kafalah* is the model proposed by Sharia law in this respect." *Id.* at 55.

31. BARBARA MELOSH, *STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION* 15 (2002).

32. David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 461 (1999). *But see* Chris Guthrie & Joanna L. Grossman, *Adoption in the Progressive Era: Preserving, Creating, and Re-creating Families*, 43 AM. J. LEGAL HIST. 235, 237 (1999) (noting that "at least four other states" had enacted less comprehensive statutes before Massachusetts).

33. Papke, *supra* note 32, at 459.

34. CONN, *supra* note 27, at 75–82; *see* MIRIAM Z. LANGSAM, *CHILDREN WEST: A HISTORY OF THE PLACING-OUT SYSTEM OF THE NEW YORK CHILDREN'S AID SOCIETY, 1853–1890* (1964) (discussing how a young clergyman helped to solve New York City's



zealous social workers to take children away from "backward" communities.<sup>35</sup>

By the middle of the twentieth century, the paradigm was matching children to their adoptive parents, to simulate the biological family.<sup>36</sup> The surrender and placement of the baby were managed by specialized social workers. Birth parents, especially mothers, were seen as beneficiaries of adoption. They were relieved of any responsibility for, or obligation to, the child. Rather, they got a "fresh start."<sup>37</sup>

As Professor Laura Briggs explains, however, this was "an intensely racialized story."<sup>38</sup> The following sections briefly describe the Indian Adoption Project and the placement of black children with white parents. In Native American communities and black communities, the state addressed desperate levels of child poverty—the result, at least in part, of long-term, systematic discrimination against the communities themselves—by removing children and babies from their homes. The children were placed with middle-class white families eager to adopt. This created a template for private "solutions" to a public problem, at little cost to the state.

## 1. The Indian Adoption Project

In 1881, Congress decided that school attendance was mandatory for Native American children.<sup>39</sup> Children were taken from their tribes and sent to government boarding schools or mission schools to become

child vagrancy problem in the 1850's by creating the placing-out system and the development of the placing-out system around the country during the time period following).

35. See, e.g., Papke, *supra* note 32, at 467–68, observing that: "[T]he state had the power to intervene in unsuccessful families and place jeopardized children from those families into houses of refuge, reformatories, industrial schools and other institutions in which they were to become better citizens . . . aggressive state action of this sort was most likely to be directed against working-class and/or immigrant families which seemed not to embody the values or conduct themselves in the ways preferred by the dominant classes." Compulsory boarding school for Native American children was a part of this project. See *infra* Part I.A.1.; Lila George, *Why the Need for the Indian Child Welfare Act?*, in *THE CHALLENGE OF PERMANENCY PLANNING IN A MULTICULTURAL SOCIETY* 165–66 (Gary R. Anderson et al. eds., 1997).

36. See MELOSH, *supra* note 31, at 4 (noting that in the postwar years: "[A]doption assumed a prominent role as social policy. With the support of a broad white middle-class consensus, social workers supervised an exponential expansion of adoption. Their advocacy echoed larger social themes of post-war optimism and mobility.").

37. Naomi R. Cahn, *Family Issue(s)*, 61 U. CHI. L. REV. 325, 346 (1994) (reviewing ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* (1993)) (citing Bartholet for the proposition that "adoption is . . . better for single birth mothers, whose socioeconomic status is likely to increase after giving up their child.").

38. BRIGGS, *supra* note 3, at 7.

39. The authority of the Indian agent and the BIA was established, and enforced, by the United States Congress. *Id.*

“civilized.”<sup>40</sup> Parents who refused to send their children to school could be denied their food and clothing rations by the Bureau of Indian Affairs (BIA),<sup>41</sup> even though these rations had been guaranteed in treaties in exchange for land.<sup>42</sup>

The removal of children from Native American families to promote assimilationist welfare policies was an ambitious project intended to solve the “Indian problem.” As the Commissioner of Indian Affairs explained in 1886:

It is admitted by most people that the adult savage is not susceptible to the influence of civilization, and we must therefore turn to his children, that they might be taught to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization . . . . They must be withdrawn, in tender years, entirely from the camp and taught to eat, to sleep, to dress, to play, to work, to think after the manner of the white man.<sup>43</sup>

As Professor Lila George explains, the “boarding school era,” which began in the 1880s and continued until the Indian Adoption Project in the late 1950s, taught children that their own cultures were “immoral, inferior and contemptible.”<sup>44</sup> Their clothes were replaced by uniforms, their languages by English, their beliefs by Christian doctrine, and their customs by rigid rules, often enforced by corporal punishment, which was generally eschewed in Native American cultures.<sup>45</sup>

The boarding schools began closing in the 1930s, when the Indian Reorganization Act restored some autonomy to the tribes. By the 1950s, however, many children had no functional families to return to. Even if there were family members, they were likely to be very poor. By the 1950s, Native Americans were at the bottom of the economic ladder. Their land holdings had shrunk from 138 million acres of treaty land in 1887 to 48 million in 1934, 20 million acres of which were desert or semi-desert.<sup>46</sup> This was accomplished through the Dawes General Allotment Act, which, according to Briggs, provided several mechanisms for making tribal lands available to white settlers, railroads, oilmen, and even organized crime syndicates.<sup>47</sup> These

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40. See Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Law Doctrine*, 23 AM. INDIAN L. REV. 1, 13–18 (1998) (describing the role of boarding schools in United States assimilationist policies).

41. See *id.* at 8. (referencing information contained in footnote 66 discussing government withholding of rations).

42. *Id.*

43. George, *supra* note 35, at 165.

44. *Id.*

45. *Id.*; Graham, *supra* note 40, at 26–27 (describing how the rejection of corporal punishment by Native Americans families was later criticized as ‘too permissive’ by social workers, and relied upon, in connection with other practice—such as leaving children with relatives – as a basis for removing children from their home).

46. BRIGGS, *supra* note 3, at 68–69.

47. *Id.* at 68.

included transferring tribal lands to individual households, which could then be persuaded to sell their land, or be cheated out of it.<sup>48</sup>

The Social Security Act, which was passed in 1935, included Aid to Dependent Children (ADC), which was administered by the states. This allowed state social workers to decide whether Indian children were being properly cared for by their often unmarried Indian mothers, or other members of their extended families.<sup>49</sup> Both forms of care, by single parents and by other relatives, were viewed in the 1950s as inferior to care provided by a stay-at-home mother in an intact nuclear family. It was expensive, moreover, to run boarding schools for Indian children or to pay for their foster care.<sup>50</sup> Nor did the "Indian problem" seem to be any closer to a solution.

A new approach was needed. Merely interrupting a child's life on the reservation was insufficient; her ties to her family and community had to be severed. As one local official explained:

If you want to solve the Indian problem you can do it in one generation. You can take all of our children of school age and move them bodily out of the Indian country and transport them to some other part of the United States. Where there are civilized people . . . [i]f you take these kids away and educate them to make their own lives, they wouldn't come back here.<sup>51</sup>

But the BIA could not directly facilitate adoptions because of its legal obligation to operate in the best interest of the tribe.<sup>52</sup> So the BIA contracted with the Child Welfare League of America to place Indian children with white families.<sup>53</sup> The Indian Adoption Project, initiated in 1958 and ending in 1968, placed children "far from the reservation, geographically as well as culturally."<sup>54</sup> The Project placed 395 Indian children with white families.<sup>55</sup>

The purpose of the federally sponsored Project, according to its Director, was not to remove a massive number of children itself, but "to

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48. See *id.* (discussing the division of reservation land and distribution to different varieties of holders).

49. The BIA reported that many children who "might have been firmly established in secure homes at an early age through adoption had been passed from family to family on a reservation." DAVID FANSHEL, *FAR FROM THE RESERVATION* 36-37 (1972). While noting that there are over 550 federally recognized Native American nations, with "distinct histories, cultures, governments, economic institutions... [and] philosophies," Graham explains that within their diverse traditions, there are "unifying concepts." These include "extensive kinship networks" that extend to "past and future generations." Graham, *supra* note 40, at 27.

50. See Graham, *supra* note 40, at 7 (discussing the costs of educating Native Americans versus killing them).

51. George, *supra* note 35, at 169.

52. *Id.*; see FANSHEL, *supra* note 49, at 38 (discussing the employment of an experienced social worker as Project Director to help conduct a thorough study of tribal laws and state laws).

53. George, *supra* note 35, at 169.

54. *Id.*

55. *Id.*

stimulate the adoption of American Indian children on a nation-wide basis.”<sup>56</sup> It was very successful. Demand for adoptees far exceeded Project capacity, so agencies in the children’s home states arranged for their adoptions. By the early 1970s, between 25 percent and 35 percent of Native American children had been legally adopted by white families.<sup>57</sup>

The devastating impact of the removal of their children, on their families as well as their tribes, is reflected in the Congressional findings set out in the Indian Child Adoption Welfare Act of 1978 (ICWA).<sup>58</sup>

[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . . [A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.<sup>59</sup>

In *Mississippi Band of Choctaw Indians v. Holyfield*<sup>60</sup> the Supreme Court examined the jurisdictional provisions “[a]t the heart of the ICWA.”<sup>61</sup> *Holyfield* involved the adoption of twin illegitimate infants whose parents, both members of the tribe, “went to some efforts to see that they were born outside the reservation”.<sup>62</sup> Although the babies were never physically present on the reservation, and the parents voluntarily surrendered them to the non-Indian adoptive parents, the Court held that the ICWA established exclusive jurisdiction in the tribal courts over Indian children domiciled there and that the “domicile of origin” for Indian babies was that of their mother.<sup>63</sup>

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56. FANSHEL, *supra* note 49, at 35.

57. George, *supra* note 35, at 172–73.

58. 25 U.S.C. §1901 *et seq.*

59. *See id.* (Congress explicitly noted, “that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”).

60. *See generally* *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

61. *Id.* at 36.

62. *Id.* at 30.

63. *See* Solangel Maldonado, *Race Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 27 (2008) (Professor Maldonado notes that the ICWA privileges biology over social, legal or political identification for purposes of determining who is Native American); *see also* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L. J. 587, 625–42 (2002) (criticizing the ‘existing-Indian family’ exception).

In a recent decision, *Adoptive Couple v. Baby Girl*,<sup>64</sup> however, the Supreme Court held that the ICWA did not bar the adoption of an Indian baby by non-Indians where her Indian father had never had physical or legal custody of her.<sup>65</sup> As Justice Sotomayor noted in her dissent, the ICWA, “protects not only Indian parents’ interests but also those of Indian tribes.”<sup>66</sup>

In *Adoptive Couple*, the majority retreats from the fuller understanding of the importance of children to their communities set out in ICWA and confirmed in *Holyfield*.

## 2. Placing Black Children with White Families

### a. From the Colonies through Reconstruction

As historian Mary Ann Mason has documented, black children were first placed with white households in the American colonies as slaves.<sup>67</sup> By 1776, about 20 percent of American children were slaves. They were legally the property of white slave owners in the north as well as in the south.<sup>68</sup> Unlike free white children, who under the common law inherited their status from their fathers, black children inherited their status from their mothers.<sup>69</sup> This reflected the frequent impregnation of slave women by white men, especially white slave owners.<sup>70</sup> Under slavery, accordingly, “fatherhood [was irrelevant].”<sup>71</sup> Children born to free blacks were also free, although, if their parents could not support them, they might be “put out,” i.e., placed with better-off households as indentured servants.<sup>72</sup> In the southern colonies, children of free or indentured white women and black slaves were considered indentured until they reached the age of thirty or thirty-one.<sup>73</sup>

Children were more likely to be left with their mothers in the agrarian south, where children were valued as workers. After the African slave trade ended at the beginning of the 1800s, moreover, children were the only way to maintain an enslaved labor force.<sup>74</sup> In the relatively industrialized north, in contrast, there were fewer slaves

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64. See generally *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

65. *Id.*

66. *Id.* at 2583.

67. MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 39 (1994).

68. *Id.*

69. *Id.* at 43.

70. *Id.*

71. *Id.*

72. *Id.* at 41.

73. *Id.* at 42.

74. *Id.* at 44.

and they were more expensive, especially in cities.<sup>75</sup> Owners were more likely to sell babies to save the costs of supporting them.<sup>76</sup>

In *Neglected Stories: The Constitution and Family Values*,<sup>77</sup> Professor Peggy Cooper Davis describes how enslaved families coped with their inability to claim legal ties to parents and children through fictive kin and extended caregiving networks.<sup>78</sup> Davis draws on army and Freedman's Bureau records of the 1860s to tell the stories of black parents, no longer slaves after the Civil War, who tried to reunite families that had been torn apart by slavery.<sup>79</sup> White southerners claimed that the black children in their households were not slaves, but "apprentices," who were better off with them than they would be with their free, but destitute, biological families. Davis describes the black soldiers who had fought with Union forces and sought to reclaim their children at the end of the Civil War. She quotes General John M. Palmer, who addressed twenty thousand black soldiers in 1865, "If any one has your children, go and get them. If they will not give them to you, steal them out at night. I do not think you will be committing any crime, nor do I believe the Almighty Ruler of the Universe will think you have committed any."<sup>80</sup>

b. From the Civil Rights Movement to the Adoption and Safe Families Act

Professor Briggs has shown how white southerners in the 1950s "tried to make an issue of unwed black mothers and their bastard children to counter the image of black dignity and respectability" projected by Martin Luther King Jr. and other civil rights activists.<sup>81</sup> It was an early iteration of what later emerged as an effective strategy of blaming black mothers for black poverty or, as Daniel Patrick Moynihan put it, the "tangle of pathology."<sup>82</sup> Northern liberals, impressed by peaceful protestors in suits and ties, were less sympathetic to single mothers raising children in fatherless households. As Briggs explains, "Race, reproduction, and the politics of unwed mothers were the shoals on which the progress of the civil rights movement foundered."<sup>83</sup>

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75. *Id.* at 45.

76. *Id.* at 46.

77. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1998).

78. *See id.* at 4 (crafting an overview of the stories that would be discussed in the pages to come of Davis's novel).

79. *Id.* at 144.

80. *Id.*

81. BRIGGS, *supra* note 3, at 8.

82. *See* DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965) (labeling the strife and systemic issues the Negro family would face as the "tangle of pathology").

83. BRIGGS, *supra* note 3, at 30.

In 1954, Congress amended the Social Security Act to allow agricultural and domestic workers to qualify for AFDC. This meant that black women and children in the South were eligible for welfare under federal law.<sup>84</sup> Mississippi enacted state-wide rules banning benefits for "immoral" or "unsuitable" households, striking thousands of "illegitimate" children from state welfare rolls.<sup>85</sup> Florida took similar steps, excluding fourteen thousand from benefits in 1959.<sup>86</sup> In 1964, the Mississippi legislature debated a bill making it a felony to bear or beget an illegitimate child, punishable by sterilization or three years in prison.<sup>87</sup> The legislation was expressly aimed at black women.<sup>88</sup> When the federal government tried to desegregate New Orleans' schools, Louisiana cut more children from AFDC.

In response, the Secretary of HEW, Arthur Flemming, promulgated a rule prohibiting states from cutting such benefits unless they provided an alternative for the affected children in foster care or orphanages, at much greater cost to the state.<sup>89</sup> But the Fleming Rule backfired. Instead of discouraging states from denying benefits to single black mothers, it discouraged these mothers from applying for benefits, since by doing so they risked losing their children.<sup>90</sup>

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act,<sup>91</sup> which promised, as then-President Bill Clinton put it, "to end welfare as we know it."<sup>92</sup> AFDC was replaced by Temporary Assistance to Needy Families (TANF), which put a federal lifetime cap of five years on welfare, although states were allowed to set even shorter limits.

A year later, in 1997, Clinton signed the Adoption and Safe Families Act (ASFA),<sup>93</sup> which aimed "to double the number of foster children adopted annually to 54,000 by 2002."<sup>94</sup> When a child is put in foster care, the new law requires a permanency hearing to be held within a year. If the child is still in foster care three months later, with specific exemptions for relative care, such as the agency's failure to make reasonable efforts at reunification, or some other "compelling

84. *Id.* at 39.

85. *Id.* at 38.

86. *Id.*

87. *Id.* at 39.

88. *See id.* (quoting a sponsor of the bill, "The negro woman, because of child welfare assistance, [is] making . . . a business . . . of giving birth to illegitimate children. . . . The purpose of my bill was to try to stop, or slow down, such traffic at its source.").

89. Enacted as Public Law 87-31, Public Service Amendments of 1962.

90. *See* BRIGGS, *supra* note 3, at 42 (discussing the aftershocks of the Fleming rule and its targeted action of taking black children away from their mothers).

91. Pub. L. 104-193, 110 Stat. 2105 (1996).

92. *See, e.g.,* Alana Semuels, *The End of Welfare as We Know It*, ATLANTIC (Apr. 1, 2016), <https://www.theatlantic.com/business/archive/2016/04/the-end-of-welfare-as-we-know-it/476322/> [<https://perma.cc/T52L-MUWP>] (archived Oct. 23, 2017).

93. Pub. L. 105-89, 111 Stat. 2115 (1997).

94. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 105 (2002).

reason,” the agency is expected to commence termination proceedings. The federal government also pays states bonuses for children adopted above the state baseline, determined by average adoptions between 1995 and 1997.<sup>95</sup> In 1999, there were forty-six thousand adoptions and states received USD 20 million in adoption bonuses.<sup>96</sup> As Professor Roberts notes, the “number of children in foster care . . . doubled . . . from 262,000 in 1982 to 568,000 in 1999.”<sup>97</sup> By the end of 1986, 35 percent of the children in foster care were black.<sup>98</sup> By 2000, 42 percent of the children in foster care were black, even though only 17% of American children were black.<sup>99</sup>

### 3. Privatized Adoption

Adoption in America has been transformed during the past few decades, reflecting the dramatic increase in births to unmarried women, the decreasing stigma for such births, easier access to effective contraception, the greater autonomy of birth mothers, and the resulting increase in “open” adoptions.<sup>100</sup> In open adoptions, either or both birth parents are known to the adopting parents and often expect to have some kind of ongoing relationship with the child. These range from periodic updates on the child’s development to ongoing contact.

The increase in the number of surrendering mothers choosing open adoption, along with the declining number of available babies, contributed to a surge in intercountry adoption by parents unable to adopt domestically or unwilling to enter into an open relationship with birth parents. Intercountry adoption enabled these parents to adopt babies or toddlers, usually without dealing with birth parents, as described below.<sup>101</sup>

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95. *Id.*

96. *Id.* at 111.

97. *Id.* at 8.

98. *Id.*

99. *Id.*

100. See, e.g., Lisa Belkin, *Now Accepting Applications for My Baby*, N.Y. TIMES, (Apr. 5, 1998), <http://www.nytimes.com/1998/04/05/magazine/now-accepting-applications-for-my-baby.html> [https://perma.cc/X328-TX97] (archived Oct. 23, 2017) (describing process through which birth mother selected parents of child she was surrendering). Melosh has criticized open adoption:

[I]t is bad social policy and poor ethical practice to rely on a laissez-faire system of adoption that, in practice, becomes modeled on the market place. What happens to the principle of a child’s best interest in a situation where market models prevail? Social work protocols for placement have not been perfect; they reflect the commitments and blind spots of their own historical moments. But can we assume that children are better served by placements made according to the unassisted judgment of a young woman— usually a teenager— facing an unplanned and unwanted pregnancy?

MELOSH, *supra* note 31, at 289.

101. See generally Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163 (2015) (arguing for increased openness in international adoption).



### B. The Globalization of Adoption

International adoption began after World War II in the United States with Pearl S. Buck's big-hearted project to save children in a chaotic, desperately poor, post-war China.<sup>102</sup> After adopting seven children herself, the well-known author opened her own adoption agency, Welcome House, when she was unable to place two mixed-race children in any of the existing American agencies.<sup>103</sup> Buck was saving the children from communism as well as from poverty.<sup>104</sup> She was part of a triumphant, prosperous, post-war America that was ready to save the world. A few years later, after the Korean War, Harry and Berthe Holt saw a film about orphans, *Lost Sheep*, at an evangelical church in Oregon. They were moved to adopt eight South Korean children. A photo of the Holts with their newly adopted children exiting the plane appeared on the cover of *Life* magazine. The Holts also opened an international adoption agency.

Scorned by the adoption professionals, Buck and the Holts made no effort to screen parents or "match" children. They assumed that with enough love and good will anyone could parent abandoned children who would otherwise be alone, neglected, and probably soon dead. Just as Buck wanted to save orphans from the communists and the Holts wanted to save biracial children (thanks to their American military fathers) from racism, subsequent waves of adopters sought to save children from racism (biracial children after the Vietnam War), from China's notorious one-child policy, and from a host of natural disasters. As author and adoptive parent John Seabrook explains:

The desire to adopt needy children from other parts of the world, especially during times of crisis, is not an exclusively American impulse, but it draws together several threads in our national character. It combines an evangelical zeal to save the lost, a humanitarian spirit, and the love of a sensible idea: by bringing childless families together with orphans, international adoption solves two problems with a single stroke.<sup>105</sup>

Intercountry adoption peaked in 2004, when roughly 45,000 babies and young children were adopted internationally, half of whom

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102. BRIGGS, *supra* note 3, at 151. Of course, there have been less well-intentioned impulses to 'adopt' children in order to put them to work, or worse. However characterized, these are the antecedents of international trafficking, not international adoption.

103. CONN, *supra* note 27, at 116–17 ("[I]n the sixty-plus years since Welcome House and similar organizations began their work, upwards of 800,000 children have come to the U.S. for adoption.").

104. BRIGGS, *supra* note 3, at 151.

105. John Seabrook, *The Last Babylift*, NEW YORKER (May 10, 2010), <https://www.newyorker.com/magazine/2010/05/10/the-last-babylift> [<https://perma.cc/RAU2-HAF5>] (archived Oct. 23, 2017).

came to the United States.<sup>106</sup> But international adoptions have plummeted in the past ten years, reflecting complex changes in attitudes throughout the world toward adoption and toward America. In 2015, there were only 5,647 foreign adoptions in the United States.<sup>107</sup>

## 1. Children in Crises

The story of Welcome House and the Holts are heroic stories of “child rescue.” These are the origin stories of intercountry adoption, and they have been retold in a long line of crises, including, most recently, the Haitian children “rescued” after the earthquake.<sup>108</sup> But it is a story that is rarely true. Most children in crisis are only temporarily separated from parents, or other family members, who will care for them once they are reunited. As the United Nations High Commissioner on Refugees (UNHCR) explains, since “most unaccompanied children are not orphans, what they need is suitable interim care with a view toward possible reunification with their families, not adoption.”<sup>109</sup> Nor are these children in imminent danger. As the authors of *Unaccompanied Children* observe, “[I]n virtually all emergencies, individuals and families have spontaneously provided assistance to children other than their own, even in the face of danger,

106. Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 GLOB. POL’Y 91, 95 (2010).

107. Bureau of Consular Affairs, U.S. Dep’t of State, *Intercountry Adoption, Statistics*, <https://travel.state.gov/content/adoptionsabroad/en/about-us/statistics.html> [<https://perma.cc/FV7W-59V6>] (archived Oct. 23, 2017).

108. Seabrook, *supra* note 105.

109. U.N. High Comm’r for Refugees (UNHCR), UNHCR Policy on Adoption of Refugee Children (Aug. 1995), <http://www.unhcr.org/en-us/protection/globalconsult/3bd035d14/unhcr-policy-adoption-refugee-children.html> [<https://perma.cc/C76C-APAM>] (archived Oct. 23, 2017); see generally U.N. High Comm’r for Refugees, *Refugee Children: Guidelines on Protection and Care*, (Jan. 1, 1994) <http://www.unhcr.org/en-us/protection/children/3b84c6c67/refugee-children-guidelines-protection-care.html?query=unhcr%20refugee%20children%20guidelines> [<https://perma.cc/E392-HZTV>] (archived Oct. 23, 2017) (“[C]hildren in an emergency context are not available for adoption. The adoption of an unaccompanied child of concern to the High Commissioner must be determined as being in the child’s best interest and carried out in keeping with applicable national and international law.”); Int’l Comm. of The Red Cross (ICRC), ICRC Statement to the UNHCR Global Consultations on International Protection: Refugee Children (May 24, 2002) <https://www.icrc.org/eng/resources/documents/statement/5as9pp.htm> [<https://perma.cc/5H5A-26NV>] (archived Oct. 23, 2017) (defining “unaccompanied child” as “a child under 18 years of age or the legal age of majority who is separated from both parents and is not being cared for by a guardian or another adult who, by law or custom, is required to do so”). The ICRC has not taken legal responsibility for unaccompanied children. Daniel Steinbock, *Unaccompanied Children in Comparative and International Law*, in EVERETT M. RESSLER, NEIL BOOTHBY & DANIEL J. STEINBOCK, UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS 269 (1988).

scarcity, and risk. . . . [I]n refugee and displaced person camps, families have adopted and cared for unaccompanied children."<sup>110</sup>

The adoption of children in crises effectively precludes family reunification. In "Operation Babylift," children in a Vietnamese "orphanage" were brought to the United States and adopted. But their parents had left them there temporarily, for safety. Five of the Vietnamese families brought lawsuits and won. Several came to the United States, "tracked down the families who had adopted their children, and demanded them back."<sup>111</sup>

## 2. The Hague Convention on Intercountry Adoption

### a. Community Claims

International adoption law, as set out in The Hague Adoption Convention as well as the CRC,<sup>112</sup> is grounded in claims made where children have been taken from their community of origin because of egregious human rights violations. Such claims have historically been made by a specific community, such as Jews after World War II or those who opposed the military regime in Argentina in the latter half of the twentieth century. In Poland, many Jewish children were informally adopted by non-Jews during World War II after their parents fled or were taken away by the Nazis.<sup>113</sup> Some of these children later reclaimed their Jewish heritage.<sup>114</sup> A few were actually reunited with their parents.<sup>115</sup> In 1986 Poland joined with Argentina to propose that the CRC require states to assist any child "fraudulently deprived of . . . his identity."<sup>116</sup>

110. Steinbock, *supra* note 109; see also Barbara Stark, *Lost Boys and Forgotten Girls: Intercountry Adoption, Human Rights, and African Children*, 22 ST. LOUIS U. PUB. L. REV. 2 (2003) ("The system works, like too many child welfare regimes, in a patched-together, haphazard way.")

111. Seabrook, *supra* note 105. The lawsuits filed in response to 'Operation Baby Lift' include: *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1197 (9th Cir. 1975); *Huynh Thi Anh v. Levi*, 427 F. Supp. 1281 (E.D. Mich. 1977); *Hao Thi Popp v. Lucas*, 438 A.2d 755 (Conn. 1980).

112. CRC *supra* note 7, Art. 21.

113. See, e.g., ASS'N OF "CHILDREN OF THE HOLOCAUST" IN POLAND, <http://www.dzieciholocaustu.org.pl/szab51.php?s=index3.php> [<https://perma.cc/P7XL-WF5G>] (archived Oct. 23, 2017) (containing home page of organization of children saved by Poles, with membership of 750 in 1999); see also HENRYK GRYNBERG, *CHILDREN OF ZION* (Jacqueline Mitchell trans., Northwestern Univ. Press 1997) (1994) (documenting interviews with Polish war orphans); Nahum Bogner, *The Convent Children: The Rescue of Jewish Children in Polish Convents During the Holocaust*, in YAD VASHEM STUDIES XXVII 235 (Naftali Greenwood trans., Yad Vashem Martyr's and Heroes Remembrance Auth. 1999) (describing children who survived the Holocaust in Polish convents).

114. See ASS'N OF "CHILDREN OF THE HOLOCAUST" IN POLAND, *supra* note 113.

115. Bogner, *supra* note 113, at 284.

116. D. Marianne Brower Blair, *The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination*, 22 MICH. J. INT'L. L. 587, 647

During Argentina's "dirty war" in the 1970s and early 1980s, thousands of dissidents were illegally detained and subsequently murdered by the military police ("disappeared").<sup>117</sup> Hundreds of children of the "disappeared," including infants born while their mothers were in police custody, had been adopted, some by the same military police who killed their parents.<sup>118</sup> While most of these children were never found, some of them were tracked down and returned to their families of origin under the "best interests of the child" custody standard in the 1980s.<sup>119</sup> The results were mixed.<sup>120</sup> While some of the children adjusted readily to their new families, others were ambivalent. While some adoption professionals pressed for reunification, others were concerned that the children's interests were being subordinated to that of the group.<sup>121</sup>

#### b. National Laws and International Standards

Adoption law is governed by national law, and different national laws are coordinated by the Hague Convention and subject to international human rights law. In general, adoption laws protect the rights of biological families, and protect adoptive parents from subsequent claims, by requiring the freely given consent of the biological parents.

Intercountry adoption advocates agree that the child must be "properly" separated from both biological parents and that the child should be placed with appropriately screened parents.<sup>122</sup> Most advocates concede that in-country placement with a family is the first

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(2001) (providing historical background on these states' support of Article 8). Polish law did not allow adult adoptees access to identifying information until 1995. *Id.*

117. See Laura Oren, *Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina*, 14 HARV. HUM. RTS. J. 123, 127–28 (2001) (describing abduction and presumed murder of thousands of dissidents).

118. Estimates are that as many as 450 children "were given or sold to childless military or police families." *Id.* at 124.

119. *Id.* at 125. Of 200 documented kidnapped children, forty-two were found. Nineteen of these were reunited with their biological families; twelve stayed with their adoptive families (while resuming their original names and developing ties with their families of origin); six cases were pending; and five of the children were dead. *Id.* at 164.

120. *Id.* at 162; see Op-ed, *America's Role in Argentina's Dirty War*, N.Y. TIMES, (Mar. 17, 2016), <https://www.nytimes.com/2016/03/17/opinion/americas-role-in-argentinass-dirty-war.html> [<https://perma.cc/EWY6-ZFVL>] (archived Oct. 23, 2017) (urging Obama to declassify intelligence records of America's role in "a dark chapter of Argentine history").

121. In 1987, Argentina established a National Genetic Data Bank to enable families to establish the true identities of children of the disappeared. Francisco Goldman, *Children of the Dirty War*, NEW YORKER (Mar. 19, 2012), <https://www.newyorker.com/magazine/2012/03/19/children-of-the-dirty-war> [<https://perma.cc/6C9D-HLR7>] (archived Dec. 24, 2017). In 1996, Argentina passed an adoption act which assures adoptees access to their original birth records. BARBARA STARK, *INTERNATIONAL FAMILY LAW: AN INTRODUCTION* 56 (2005).

122. *International Adoption*, *supra* note 1, at 95.

preference for an otherwise eligible child, although Bartholet argues that preference be given to the first available placement instead.<sup>123</sup> The real debate is between intercountry adoption and in-country “care,” which may include institutionalization. Under the Hague Convention, if in-country adoption or other “family” care is not feasible, international adoption is preferred over in-country institutionalization.<sup>124</sup> Under the CRC and the Banjul Charter, in contrast, in-country foster care or other “suitable” care—including institutionalization—is preferred over intercountry adoption.<sup>125</sup>

The Hague Convention requires sending countries to provide proof of parental consent along with social and medical histories. It also prohibits any payments that could be construed as baby-selling. The rules are clear and comprehensive. Journalist E. J. Graff suggests that the Convention may well be the best defense against the bribery and corruption that have characterized so much intercountry adoption.<sup>126</sup> But implementing the Convention requires infrastructure, including mechanisms to ensure accurate record-keeping, that many sending states lack. The Convention also requires a culture of compliance, in which birthmothers are counseled, and social and medical histories recorded, by trained professionals, working for a salary, not a commission.<sup>127</sup> This is rarely the reality in sending states.

Critics of intercountry adoption contend, “There are simply not enough healthy, adoptable infants to meet Western demand—and there’s too much Western money in search of babies. As a result, many international adoption agencies work not to find homes for needy children but to find children for Western homes.”<sup>128</sup> Nigel Cantwell, an expert on child welfare and adoption systems in Eastern Europe and Central Asia, was asked how many healthy babies in those regions would be available for international adoption if money never exchanged hands. “I would hazard a guess at zero,” he replied.<sup>129</sup>

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123. *Id.* at 107.

124. Elizabeth Bartholet & David Smolin, *The Debate*, in KAREN SMITH ROTABI, *INTERCOUNTRY ADOPTION: POLICIES, PRACTICES AND OUTCOMES* 234–35 (2012).

125. See CRC, *supra* note 7, Art. 20.3, 21.

126. E. J. Graff, *The Lie We Love: Foreign Adoption Seems Like a Win-Win Arrangement. Unfortunately, Those Bundles of Joy May Not be Orphans at All*, FOREIGN POLICY (May–June 2009) <http://www.utne.com/politics/international-adoption-lies-orphans-myths> [<https://perma.cc/H5E2-NHTZ>] (archived Oct. 23, 2017).

127. See, e.g., U.N. Comm. on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3., para. 1), U.N. Doc. CRC/C/GC/14 at 4 (May 29, 2013) (explicitly noting “article 3, paragraph 3, which concerns the obligation of States parties to ensure that institutions, services and facilities for children comply with the established standards, and that mechanisms are in place to ensure that the standards are respected”).

128. Graff, *supra* note 126.

129. *Id.*

## II. HUMAN RIGHTS GENEALOGIES

The genealogy of human rights law, as noted above, is itself in dispute.<sup>130</sup> This Part first describes that struggle and explains why it matters for intercountry adoption. Second, this Part shows why economic rights and children's rights, neither of which are even mentioned by most of those involved in this dispute, are crucial in the context of intercountry adoption.<sup>131</sup> They are also crucial to any meaningful understanding of human rights.

### A. A "struggle for the soul of the human rights movement"

#### 1. The Conventional Story

The conventional origin story, set out in the leading human rights textbooks,<sup>132</sup> is the story of the International Bill of Rights and the UN Charter,<sup>133</sup> and the establishment of the United Nations after World War II.<sup>134</sup> In 1948, Eleanor Roosevelt chaired the international committee that drafted the Universal Declaration of Human Rights,<sup>135</sup> drawing on the ideas of the Enlightenment philosophers and the American and French revolutionaries. The principle that individuals had rights that could be asserted against their own states—even if these states did not recognize these rights—had been established by the military tribunal at Nuremberg that convicted the Nazi war criminals.<sup>136</sup>

In the 1960s, the Universal Declaration was divided into two more specific instruments, the International Covenant on Civil and Political Rights (the Civil Covenant)<sup>137</sup> and the International Covenant on

130. Alston, *supra* note 2.

131. Alston, not surprisingly, is the exception. *See, e.g., infra* note 174.

132. *See, e.g., Birth of the Movement: The UN Charter and the UDHR*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 133 *et seq.* (Henry J. Steiner et al. eds., 3d ed. 2008); *The Triumph of Human Rights After the Second World War*, in *HUMAN RIGHTS* 135 *et seq.* (Louis Henkin et al. eds., 2d ed. 2009). It is a grand story, and has been told often, sometimes eloquently. *See, e.g.,* GLENDON, *supra* note 18; LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

133. Professional Richard Gardner called this "the Constitution of the World" in my international law class at Columbia in 1989.

134. *See, e.g.,* GLENDON, *supra* note 18; JOHN HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* (1983).

135. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

136. *See, e.g.,* Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 58 Stat. 1544, 82, U.N.T.S. 280 (recognizing "crimes against humanity . . . whether or not in violation of the domestic law of the country where perpetrated."); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 187 (1992).

137. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

Economic, Social and Cultural Rights (the Economic Covenant).<sup>138</sup> These instruments are legally binding, multilateral treaties under which ratifying states ensure the human rights of their own people. Along with the Universal Declaration, the two Covenants comprise the International Bill of Rights, globally recognized as the definitive law of international human rights.<sup>139</sup>

The Civil Covenant addresses negative rights, such as freedom of religion and expression and freedom from arbitrary arrest or detention. These rights are familiar to Americans because they appear in the Bill of Rights of the US Constitution.<sup>140</sup> The Economic Covenant addresses positive rights. By ratifying the Economic Covenant, a government "commits itself to its best efforts to secure for its citizens the basic standards of material existence."<sup>141</sup>

The conventional story has been challenged, of course, almost from its inception.<sup>142</sup> But four recent books—Lynn Hunt's *Inventing Human Rights*,<sup>143</sup> Gary J. Bass's *Freedom's Battle*,<sup>144</sup> Samuel Moyn's *The Last Utopia*,<sup>145</sup> and Jenny Martinez's *The Slave Trade and the Origins of International Human Rights Law*<sup>146</sup>—raise provocative new questions about the genealogy of human rights and its implications.

138. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

139. See U.N. Comm'n on Human Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1987/17, Annex (Jan. 8, 1987), reprinted in Symposium, *The Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 121, 122 (1987) (considering the obligations of state parties to the Economic Covenant).

140. U.S. CONST., amends. I, V.

141. President Carter Signs Covenants on Human Rights, Oct. 31, 1977, DEP'T. OF STATE BULL., Jul. 4–Dec. 26, 1977, at 587.

142. See, e.g., THEODOR ADORNO & MAX HORKHEIMER, DIALECTIC OF ENLIGHTENMENT (John Cummings trans., 1972) (questioning the role of the Enlightenment project itself in the Holocaust). The "final solution" was not, after all, a barbarian rampage, but an orderly, systematic, "scientific" program of genocide—authoritarian, bureaucratic, and perversely "rational." *Id.*; see also Edward W. Said, *Yeats and Decolonization*, in NATIONALISM, COLONIALISM, AND LITERATURE 78 (Terry Eagleton et al. eds., 1990) ("By the beginning of World War I, Europe and America held 85% of the earth's surface in some sort of colonial subjugation. This, I hasten to add, did not happen in a fit of absentminded whimsy or as a result of a distracted shopping spree."); David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 NYU J. INT'L L. & POL. 335, 489 (2000).

143. LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007).

144. GARY J. BASS, *FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION* (2008).

145. MOYN, *supra* note 19.

146. JENNY S. MARTINEZ, *ON THE ORIGINS OF HUMAN RIGHTS: THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2014).

## 2. The New Revisionists

Professor Hunt begins with the question, "How, exactly, did rights become 'self-evident'?"<sup>147</sup> She finds the roots of the Enlightenment notion of rights, along with our own, in the development of empathy and a sense of personal autonomy during the eighteenth century. Hunt focuses on eighteenth century novels, and their sympathetic portrayals of "ordinary people facing everyday problems,"<sup>148</sup> to show how individual minds and hearts were transformed over time.

Professor Bass finds a very different unifying thread. His project is to show that "humanitarian intervention" has often been precisely that—humanitarian—rather than a pretext for the intervenor's own objectives. Bass tackles the cynicism of the left as well as the right. His paradigm is the "campaign against the slave trade, and then slavery itself, properly seen as the root of all modern human rights activism."<sup>149</sup> He concludes his rigorous historical and geopolitical analyses of nineteenth century humanitarian intervention with three major lessons.<sup>150</sup> First, humanitarianism is not necessarily imperialism. It might be, and caution is always necessary to distinguish the former, which is about empathy, from the latter, which is about "domination and superiority."<sup>151</sup> Second, humanitarian intervention is possible even after 9/11,<sup>152</sup> and presumably the other terrorist attacks that have occurred since. Third, humanitarian intervention "can be part of a wider grand strategy . . . [including] [b]etter and more consistent human rights policies."<sup>153</sup>

Professor Samuel Moyn, who Alston dubs "the most influential of the revisionists," presents the boldest new origin story in his controversial book, *The Last Utopia*.<sup>154</sup> Moyn dismisses those who espouse the "progressive narratives" summarized above as "church historians"—true believers whose analyses are distorted by their faith in an idealized version of human rights. For Moyn, human rights "emerged in the 1970s, seemingly from nowhere," with the award of the Nobel Peace Prize to Amnesty International.<sup>155</sup>

Human rights, for Moyn, are the rights of the individual against state repression, i.e., the state's violation of civil and political rights.

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147. HUNT, *supra* note 143, at 34.

148. *Id.* at 40.

149. BASS, *supra* note 144, at 17.

150. *Id.* at 378.

151. *Id.* at 379.

152. *Id.* at 380.

153. *Id.* at 381.

154. Alston, *supra* note 2; MOYN, *supra* note 19.

155. *Id.* at 3.



Hunt, Bass, and Martinez would probably agree, but they reject Moyn's dismissal of virtually all antecedents.<sup>156</sup>

Moyn distinguishes contemporary human rights from what others consider their antecedents by the contemporary focus on the international community, rather than the individual nation states, as their guarantor.<sup>157</sup> But there is little consensus in the international community; rather, "humanity . . . [is] still confused and divided about how to bring about individual and collective freedom in a deeply unjust world."<sup>158</sup> In the alternative, if it is not already "too late," Moyn suggests that "the concept of human rights, and the movement around it, should restrict themselves to offering minimal constraints on responsible politics."<sup>159</sup>

Martinez, like Bass, finds the spark for human rights in the abolitionist movement.<sup>160</sup> She argues that the techniques and institutions developed by that movement are as important as its core insight—that slaves were human. Alston commends Martinez's research, but criticizes her failure to mention imperialism.<sup>161</sup> More broadly, he critiques Martinez and others who perpetuate the "Enlightenment progress narrative"; that is, the claim that through reason and science, and their promotion through human rights law, humanity and the conditions under which we live will continuously improve.<sup>162</sup> "[T]hese narratives," he observes, "are especially difficult to reconcile with the widely held perception that, in absolute figures, never before have so many men, women, and children been subjugated, starved, or exterminated on the Earth."<sup>163</sup>

### 3. Does the Past Matter?

Alston is deeply skeptical of "any single [historiographical] account that purports to have found the answer to the puzzle and to have invalidated alternative interpretations" because of the "intrinsic polycentricity of the human rights enterprise."<sup>164</sup> For Alston, Moyn's

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156. These include: Greek philosophy; the Enlightenment's rights of man; the Declaration of Independence; campaigns for rights for women, workers, Jews, blacks, and immigrants; the shocked aftermath of World War II and the Universal Declaration of Human Rights; and the anti-colonialist appeals to human rights. Gary J. Bass, *The Old New Thing*, NEW REPUBLIC, (Oct. 20, 2010), <https://newrepublic.com/article/78542/the-old-new-thing-human-rights> [<https://perma.cc/U4LK-K4QG>] (archived on Oct. 23, 2017).

157. MOYN, *supra* note 19, at 13.

158. *Id.* at 227.

159. *Id.*

160. MARTINEZ, *supra* note 146.

161. Alston, *supra* note 2, at 2059.

162. See, e.g., ICESCR, *supra* note 138, Art. 11.

163. Alston, *supra* note 2, at 2063–64.

164. *Id.* at 2077–78.

“grand theory” is a small part of the story.<sup>165</sup> He explains that human rights cannot be traced to a single origin.<sup>166</sup> Rather, “the human rights enterprise is intrinsically complex and multifaceted. Its origins are to be found in different and multiple sites, and they cannot usefully be traced back to any single source or through examining the evolution of a single theme, process, or institution.”<sup>167</sup> For Alston, Moyn’s analysis is “myopic” and “unconvincing.”<sup>168</sup> Moyn has marginalized a “large array of other actors” including, notably, “the children’s rights movement with its landmark 1924 League of Nations Declaration on the Rights of the Child.”<sup>169</sup>

The absence of the children’s rights movement in Moyn’s account, as well as its absence from the books by Hunt, Bass, and Martinez, is not an oversight. As Hunt explains, “We are not surprised that [those who so confidently declared rights to be universal in the late eighteenth century] considered children, the insane, the imprisoned, or foreigners to be incapable or unworthy of fully [sic] participation in the political process, for so do we.”<sup>170</sup> Until children attain “autonomy” (“the ability to reason and the independence to decide for oneself”)<sup>171</sup> and empathy (“the recognition that others feel and think as we do”),<sup>172</sup> children are not on their radar. The human rights that matter, for these authors, are the civil and political rights that children cannot exercise until they attain the maturity to do so. Children are sequestered in the private realm of the family until that time. They are the responsibility of the family, not the state. And the family, as explained in the next subpart, is on its own.

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165. *Id.* at 2076–77.

166. *Id.* at 2066 (describing the ‘precise time frame theories’ of Linda Hunt and Gary Bass, and observing that “the existence of these highly plausible competing theories suggests that the attempt to identify a single origin is a flawed approach”).

167. *Id.* at 2078.

168. *Id.* at 2070.

169. *Id.* Others marginalized include:

(1) the great majority of non-American international lawyers, including all of those who worked on the drafting, adoption, and implementation of the European Convention on Human Rights; (2) all domestic lawyers working at the coalface of domestic constitution-drafting ... (3) all lawyers, activists, and others working to develop the substantive content of particular parts of the human rights pantheon ... (4) the antiracism movements in the United States and elsewhere; (5) minority rights regimes before and after World War II; (6) the international labor movement ... and (9) a wide range of other actors working on issues that they considered to involve rights, social movements, and elements of internationalization.

*Id.*

170. HUNT, *supra* note 143, at 18.

171. *Id.* at 28.

172. *Id.* at 29.

## B. Human Rights and Intercountry Adoption

Economic rights and children's rights—understood as encompassing two distinct ideas, discourses, social movements, legal regimes, and systems<sup>173</sup>—are both necessary in the context of intercountry adoption.<sup>174</sup> While thoughtful commentators have explained why *all* human rights are important for children,<sup>175</sup> individual civil and political rights against the state are less urgent than the economic rights necessary for survival, including food and shelter. Children, especially the young children and babies most likely to be adopted and sent to another country, cannot provide for themselves. They die unless they are cared for.<sup>176</sup> Economic rights are children's rights, of course, since children are human. But economic rights, as explained in Part III, have been gutted by the “privatization, deregulation, and state retreat from social provision” that are central tenets of neoliberalism.<sup>177</sup>

“Children's rights” are an obvious focus for adoptees. As set out in the 1924 Declaration on the Rights of the Child, children's rights required that “the orphan and the waif be sheltered and succored” from the beginning.<sup>178</sup> But the rights set out in the 1924 Declaration were not actually binding law until they were codified in the Convention on

173. These criteria refer to Alston's analytic framework “when searching for the roots of human rights.” Alston, *supra* note 2, at 2078.

174. Both easily satisfy Alston's criteria for *bona fide* human rights, if only by reference to his own work. See, e.g., Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137 (Louis Henkin & John Hargrove eds., 1994); PHILIP ALSTON ET AL., UNICEF INNOCENTI RESEARCH CENTRE, LAYING THE FOUNDATION FOR CHILDREN'S RIGHTS: AN INDEPENDENT STUDY OF SOME KEY LEGAL AND INSTITUTIONAL ASPECTS OF THE IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD (2005), [https://www.unicef-irc.org/publications/pdf/ii\\_layingthefoundations.pdf](https://www.unicef-irc.org/publications/pdf/ii_layingthefoundations.pdf) [<https://perma.cc/2RM6-JWUJ>] (archived Dec. 24, 2017). On children's rights, see also EUGEN VERHELLEN, CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND, MOTIVATION, STRATEGIES, MAIN THEMES (1994); Cynthia Price Cohen, *The Role of the United States in the Drafting of The Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185 (2006); Barbara Bennet Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1 (1999).

175. See, e.g., Jonathan Todres, *A Child Rights Framework for Addressing Trafficking of Children*, 22 MICH. ST. INT'L L. REV. 561, 590 (2014); VERHELLEN, *supra* note 174.

176. See COOPER DAVIS, *supra* note 77, at 92–93 (including accounts of slave mothers whose babies died when their mothers were forced to leave them alone when they went to work in the fields and a separate report noting that “[children were] often found dead in the field and in the quarter for want of care”).

177. Marks, *supra* note 24, at 8.

178. Geneva Declaration of the Rights of the Child, League of Nations (Sept. 26, 1924). Eglantyne Jebb, appalled by the refusal of the British government to send aid to starving children in Austria after World War I, drafted the Declaration and sent it to the League of Nations, which adopted it in 1924.

the Rights of the Child (CRC), which did not enter into force until 1989.<sup>179</sup> The CRC revives economic rights, at least for children.<sup>180</sup>

## 1. A Genealogy of Economic Rights

### a. Beginning with Bismarck

The promise of economic rights was always modest, befitting their modest origins. Beginning with Otto von Bismarck's establishment of universal health insurance in nineteenth century Germany, economic rights have served to preempt more radical redistribution efforts or to co-opt otherwise dangerous groups.<sup>181</sup> Bismarck's universal health insurance, for example, placated a population he feared would otherwise embrace socialism.<sup>182</sup>

As explained above,<sup>183</sup> economic rights were included in the Universal Declaration and set out in detailed, legally binding form in the Economic Covenant.<sup>184</sup> But "economic rights" remained modest. They were never a mechanism for global redistribution of wealth. They can only be claimed against the claimant's own state.<sup>185</sup> There is no larger pool, no "common heritage," from which the needy in any state may draw.<sup>186</sup> In 1974, the Group of 77 drafted the UN Declaration on the Establishment of a New International Economic Order (NIEO).<sup>187</sup>

179. See CRC, *supra* note 7.

180. See, e.g., HUMAN RIGHTS AND CHILDREN, at Part II (Barbara Stark ed., 2017) (essays elaborating on the economic rights assured children under the CRC).

181. PAUL R. GREGORY & ROBERT C. STUART, COMPARING ECONOMIC SYSTEMS IN THE TWENTY-FIRST CENTURY 207 (2003) ("Chancellor Otto von Bismarck introduced social welfare legislation in Germany between 1883 and 1888, despite violent political opposition, as a direct attempt to stave off Marx's [prediction of a] socialist revolution."); see HOWARD M. LEICHTER, A COMPARATIVE APPROACH TO POLICY ANALYSIS: HEALTH CARE POLICY IN FOUR NATIONS 121 (1979) (discussing The Sickness Insurance Law enacted in Germany in 1883).

182. GREGORY, *supra* note 181.

183. See *infra* Part II.A.1.

184. *Id.*

185. Marx, of course, had a different critique of rights. As Brad Roth summarizes the argument set out in *The Jewish Question*, Marx opposed rights because "they fail to overcome the underlying conditions that at once necessitate them and render largely illusory their benefits for the subordinate class." Brad Roth, *Marxian Insights on the Human Rights Project*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING THE MARXIST LEGACIES 220, 223 (Susan Marks ed., 2008).

186. LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 1456 (4th ed. 2001). In 1967, Arvid Pardo of Malta suggested in the UN General Assembly that the deep seabed should be considered the "common heritage of mankind." *Id.* This particular claim to 'common heritage' is probably moot. A team of scientists has recently concluded that "humans are on the verge of causing unprecedented damage to the oceans and the animals living in them." Carl Zimmer, *Ocean Life Faces Mass Extinction, Broad Study Says*, N.Y. TIMES, Jan. 16, 2015 at A1. Deep seabed mining is explicitly identified as a major threat. *Id.*

187. G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201 (May 1, 1974). For a detailed review and analysis of the issues, see THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH-SOUTH DEBATE (Jagdish N. Bhagwati ed., 1977).

The NIEO affirmed the rights of the former colonized states to “nationalize foreign owned companies.”<sup>188</sup> But most of the developed states, including the United States, viewed the NIEO as confiscatory<sup>189</sup> and rejected it.<sup>190</sup>

Since there is no larger pool, vulnerable groups in a poor state can only get more if others in that state get less. Implementation depends on the state, which may be prodded by the committees charged with monitoring the CESC or the CRC. The intervention of other states is more effective, but rare. The European Parliament, for example, refused to admit Romania as long as it was allowing its children to be adopted abroad.<sup>191</sup> The Parliament said that Romania was violating the CRC. Romania shut down its intercountry adoption program and joined the European Union.<sup>192</sup>

#### b. Ending with the Cold War

Since the collapse of the Soviet Union in the early 1990s and the end of the Cold War, economic rights have had few advocates.<sup>193</sup> Neoliberal economists scorn them as “inefficient,” generating bloated bureaucracies that at best impede the prosperity that comes with globalized free markets. As Jeffrey Sachs observes, “globalization has lifted 400 million people out of poverty.”<sup>194</sup> Social safety nets have been slashed and the rhetoric of economic and social security has been replaced by the rhetoric of free markets. Even China has thrown out the Iron Rice bowl, the assurance of lifelong state support, in favor of state capitalism.<sup>195</sup> As Upendra Baxi describes the triumph of neoliberalism:

[T]he paradigm of the Universal Declaration of Human Rights is being steadily supplanted by a trade-related, market-friendly, human rights paradigm . . . . [This] insists . . . upon the promotion and protection of the collective rights of

188. G.A. Res. 3201, *supra* note 187, at ¶4(e).

189. See, e.g., David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 95, 125–27 (David M. Trubek & Alvaro Santos eds., 2006) (“[F]or those who possess wealth, surrendering more of that wealth begins to look confiscatory.”). For an excellent overview, see *Note on Historical Attitudes Concerning Expropriation*, in *DAMROSCH ET AL.*, *supra* note 186, at 1083–86.

190. See *Libyan American Oil Co. v. Libya*, 17 I.L.M. 3 (1978).

191. See *International Adoption*, *supra* note 1, at 96.

192. *Id.*

193. See, e.g., Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528 (2008) (book review).

194. Jeffrey D. Sachs, *Can Extreme Poverty Be Eliminated?*, SCIENTIFIC AMERICA 56 (Sept. 2005).

195. See, e.g., Orville Schell, *To Get Rich Is Glorious: China in the 80’s* (reviewed by Donald S. Zagoria), FOREIGN AFFAIRS (Spring 1985).

global capital in ways that 'justify' corporate well-being and dignity over that of human persons.<sup>196</sup>

### c. Why Economic Rights Matter in Intercountry Adoption

Economic rights matter in intercountry adoption because parents who lack these rights, including the reproductive rights that are part of the right to health,<sup>197</sup> may be forced to abandon or surrender children they cannot support. Without an education<sup>198</sup> and work,<sup>199</sup> mothers and fathers cannot provide for their families. Without an assured and adequate standard of living,<sup>200</sup> including food, shelter, and clothing, for themselves and their children, parents, especially single mothers, are forced to make desperate choices, such as "surrendering" a child for adoption in order to feed her siblings.

Economic, social, and cultural rights also matter for adoptees. Since they are set out more specifically in the CRC, they are analyzed below.<sup>201</sup> While the child's emergence as an autonomous rights holder has been hailed as an important development,<sup>202</sup> the shift away from a "welfarist approach" also reinforces broader, more disturbing, shifts.

## 2. A Genealogy of Children's Rights

A thorough genealogy of children's human rights would be a vast undertaking, although Alston and Tobin provide a useful summary.<sup>203</sup> As they explain, the idea of children's rights, of children as a distinct group with its own specific needs, emerged in the early twentieth century in campaigns against "child labor, hazardous work, trafficking and sexual exploitation."<sup>204</sup>

More specifically, as noted above, the particular vulnerability of a child without a family was explicitly addressed in the 1924 Declaration.<sup>205</sup> These children are also singled out in the 1959 Declaration on the Rights of the Child: "Society and the public

196. Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 125, 163–64 (1998).

197. ICESCR, Art 12, *supra* note 138; see also HEALTH AND HUMAN RIGHTS: FACT SHEET N°323, WORLD HEALTH ORG. (Dec. 2015), <http://www.who.int/mediacentre/factsheets/fs323/en/> [https://perma.cc/UBL6-FR57] (archived Nov. 7, 2017).

198. ICESCR *supra* note 138, at Arts. 12, 14.

199. ICESCR, *supra* note 138, at Arts. 7–8.

200. ICESCR *supra* note 138, at Art. 11.

201. See *infra* Part II.B.2.b.

202. Alston, *supra* note 174; Jaap E. Doek, *What Does the Children's Convention Require?*, 20 EMORY INT'L L. REV. 199 (2006).

203. Alston, *supra* note 174.

204. *Id.*

205. See Geneva Declaration of the Rights of the Child, *supra* note 178.

authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support.”<sup>206</sup>

The 1924 Declaration is emphatic but vague. How, exactly, is “the orphan and the waif [to] be sheltered and succored?”<sup>207</sup> And by whom? Principle 6 of the 1959 Declaration is more specific:

He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Payment of State and other assistance towards the maintenance of children of large families is desirable.<sup>208</sup>

Neither the 1959 Declaration nor the 1924 Declaration purports to be legally binding, however.

The CRC, on the other hand, is a legally binding international treaty. Except as modified by legitimate reservations,<sup>209</sup> it is binding on every country in the world except for the United States, which is a signatory but not a party. Article 20.1 provides that: “A child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the State.” As noted above,<sup>210</sup> the CRC recognizes intercountry adoption as an option only if “the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”<sup>211</sup> The notion that a child has a right to a family resonates deeply with traditional ideas of family, and the family’s traditional responsibility for, and control over, children. At the same time, this effectively privatizes responsibility for children’s welfare.

Two major themes in the development of international children’s rights are particularly pertinent in the context of children adopted by foreign nationals. First, children’s rights are no longer viewed as essentially welfarist.<sup>212</sup> Second, the child has rights to a family, a culture, a community, and a nationality.

206. G.A. Res. 1386 (XIV), Declaration of the Rights of the Child, U.N. Doc. A/RES/14/1386 (Nov. 20, 1959) [hereinafter 1959 Declaration].

207. See Geneva Declaration on the Rights of Child, *supra* note 178 (emphasis added).

208. 1959 Declaration, *supra* note 206.

209. See, e.g., William A. Schabas, *Reservations to the Convention on the Rights of the Child*, 18 HUM. RTS. Q. 472, 474 (1996) (noting that forty-seven states parties to the CRC accompanied their ratifications “with reservations or interpretative declarations intended to limit the scope of their obligations”).

210. See *supra* Part I.B.2.

211. Convention on the Rights of the Child, *supra* note 7, at Art. 21(b).

212. See, e.g., VERHELLEN, *supra* note 174 at 69 (noting that, “[T]here is in fact no reference to rights as such” in the [1924] Declaration, which “points out adults’ obligations to children”).

a. The Shift Away from Welfarist Rights

The child is increasingly viewed as an active subject of the law, capable of exercising her own rights, rather than as a passive object, to be protected, fed, and cared for. The exercise of these rights, of course, depends on the maturity and development of the individual child, but this is to be cultivated and fostered, rather than discouraged or repressed.<sup>213</sup>

At the same time, the child is not expected to provide for herself. Rather, she is “to be protected from economic exploitation and from performing any [hazardous] work” or work likely to “interfere with her education.”<sup>214</sup> Under Article 27.2, “the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capabilities, the conditions of living necessary for the child’s development.”<sup>215</sup> States have an obligation to assist parents, if necessary, but only “within their means.”<sup>216</sup> States, especially low-income states in the global south, rarely have it within their means to make up the shortfall. Since the Great Recession, moreover, welfarist approaches have been curtailed across the board, whether as part of structural adjustment programs in the developing world or “austerity” programs in industrialized states.<sup>217</sup> Parents find it increasingly difficult, accordingly, to assure their children a decent standard of living. The child may have more “rights,” but she is also likely to have less food, healthcare, and education.<sup>218</sup>

b. The Child’s Right to Belong

The idea that a child, especially a baby or very young child, needs a dedicated caregiver, someone who loves her, and that that role is best filled by a parent, remains key to adoption. The child’s survival depends on her attachment, her intimate connection, to other people. She is part of a family and a community.

The CRC also protects the child’s right to a nationality, to be part of a larger community or culture. She has her own claims against the state. These include civil and political rights, to which infants may be oblivious, but which even very young children may begin to apprehend. Professor Verhellen considers these rights, especially political

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213. See, e.g., Didier Reynaert et al., *Introduction: A Critical Approach to Children’s Rights*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN’S RIGHTS STUDIES 1, 5 (Wouter Vandenhoe et al., eds. 2015) (“Just like human rights more generally, children’s rights originate from the quest for human dignity and social justice. However, the concrete meaning of these notions will be different for different people.”).

214. CRC, *supra* note 7, at Art. 32.1.

215. *Id.* at Art. 27.2.

216. *Id.* at Art. 27.3.

217. See *infra* Part III.C.

218. See *infra* Part IV.A.



participation rights, including the “right to express an opinion . . . freedom of thought, conscience, and religion; freedom of association . . . the most revolutionary part of the CRC.”<sup>219</sup> In conjunction with Article 21 of the CRC, this reinforces the CRC’s preference for in-country placement of adoptees.<sup>220</sup> The child has a right to be part of the state.

The child’s right to belong is important socially, psychologically, and politically.<sup>221</sup> But it remains an open question how a child’s basic needs are to be met when neither the state nor the family is able to meet them.<sup>222</sup>

### III. NEOLIBERAL GENEALOGIES

If the drafters of the Universal Declaration were planning a “world made new,” the delegates from forty-four countries who met at Bretton Woods in 1944 would figure out how to pay for it. Their project was to establish a stable international monetary system and to finance the reconstruction of Europe after World War II.<sup>223</sup> They believed that “the policies adopted by governments to combat the Great Depression—high tariffs, competitive currency devaluations, [and] discriminatory trading blocs”<sup>224</sup>—had contributed to international instability, and that peace depended on stable markets and prosperity.

They drew on the work of the economist John Maynard Keynes, who had argued that fiscal policy could be used to moderate the business cycle and enable states to avoid crippling recessions.<sup>225</sup> The scheme has been described as “embedded liberalism,” i.e., capitalism would be fostered by free trade and fixed exchange rates, unemployment would be limited by monetary policies, and social

219. Eugene Verhellen, *Facilitating Children’s Rights in Education: Expectations and Demands on Teachers and Parents*, 29 PROSPECTS 223, 225 (1999).

220. See *supra* note 125 and accompanying text.

221. There is growing literature on this subject, ranging from personal accounts to nascent movements, including initiatives by Korean adoptees to find birth parents and reclaim their culture. See, e.g., Marie Tae McDermott, *Adopted Koreans, Stymied in Search of Birth Parents, Find Hope in a Cotton Swab*, N.Y. TIMES (Aug. 28, 2016), [https://www.nytimes.com/2016/08/28/world/asia/south-korea-adoptees-325kamra.html?\\_r=0](https://www.nytimes.com/2016/08/28/world/asia/south-korea-adoptees-325kamra.html?_r=0) [<https://perma.cc/8SXZ-BSHC>] (archived Oct. 19, 2017) (explaining how “DNA testing offers a way around the bureaucratic hurdles and flawed records”).

222. The Special Rapporteur suggests one answer: i.e., that the state at the very least has an obligation to assure subsistence. Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), Human Rights Council, *Promotion and protection of all human rights, civil, political economic, social and cultural rights, including the right to development*, U.N. Doc. A/HRC/29/31 (May 27, 2015) at 17 [hereinafter Special Rapporteur, May 2015].

223. U.S. Dep’t of State, Office of the Historian, *Bretton Woods-GATT, 1941–1947*, <https://history.state.gov/milestones/1937-1945/bretton-woods> (last visited Dec. 24, 2017) [<https://perma.cc/H6ZR-7TNM>] (archived Oct. 19, 2017).

224. *Id.*

225. DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE: HAYAK, FRIEDMAN AND THE BIRTH OF NEOLIBERAL POLITICS* 2–3 (2012).

welfare programs would be financed by the states.<sup>226</sup> The system worked well, at least for the industrialized democracies, until the 1970s.

Oil price shocks, the expenses of the Vietnam War and Lyndon Johnson's antipoverty programs, and Britain's IMF loan resulted in stagnant growth, surging inflation, and unemployment.<sup>227</sup> Keynes's prescriptions no longer worked. Liberals and conservatives, in the United States and the United Kingdom, were desperate for new approaches, and the neoliberals were ready.

### A. *Intellectual Origins*

In 1938, a group of academics in Paris had formed the Colloque Walter Lippmann, to resuscitate a liberalism that they believed had lost its way. "Liberalism" was no longer focused on individual liberty and free markets, but on leftist social welfare programs.<sup>228</sup> The project was interrupted by World War II, but was resumed after the war by Friedrich von Hayek, Ludwig von Mises, Wilhelm Röpke, and other scholars, "bound by a deeply held conviction that freedom was under threat."<sup>229</sup>

The term "neoliberalism" has been used by many commentators to refer to many different ideas, and the project has also changed over time. The core of the original critique was a "free market ideology based on individual liberty and limited government that connected human freedom to the actions of the rational, self-interested actor in the competitive marketplace."<sup>230</sup> Instead of state bureaucrats trying to manage the economy, it would be left to the market, drawing on the energy and genius of individual market actors. As Friedman explained in *Capitalism and Freedom*, the market was both the ends and means; it would assure social goods even as it embodied them.<sup>231</sup>

In the 1950s and 1960s, think tanks, including several sponsored by "American household corporate names such as DuPont Chemicals, General Electric, and Coors Brewing Company,"<sup>232</sup> built on the work of the original intellectuals to develop sophisticated economic analyses. The sophistication of their work became a proof in itself that the economy was far too complex for most people to understand, or, as a corollary, to be left to the whims of an ignorant democracy. As Pierre Dardot and Christian Laval explain:

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226. HARVEY, *supra* note 20, at 21.

227. *Id.* at 22.

228. See generally PIERRE DARDOT & CHRISTIAN LAVAL, *THE NEW WAY OF THE WORLD: ON NEOLIBERAL SOCIETY* 49–73 (2013).

229. *Id.* at 31–32.

230. JONES, *supra* note 225, at 2.

231. *Id.* at 7–8.

232. *Id.* at 153.

Contrary to Locke, Hayek refuses to confer on the majority of the people an absolute power to oblige all its members. . . . This means that democracy is not an end, but only ever a means, which possesses value solely as a method of selecting leaders. Thus, Hayek had the merit of candour when he declared to a Chilean newspaper under the dictatorship of Pinochet in 1981: "Personally, I prefer a liberal dictator to democratic government lacking liberalism."<sup>233</sup>

Neoliberalism was unabashedly anti-democratic. The market, representing the genius of the most successful investors, was far more likely to produce a robust economy than progressive bureaucrats trying to advance an inchoate "common good."

### B. *The Politics of Neoliberalism*

Even before Margaret Thatcher and Ronald Reagan, liberals like Jimmy Carter and James Callaghan were abandoning Keynesian precepts and loosening government regulations.<sup>234</sup> As Friedman conceded, the adoption of supply-side reforms—deregulation, privatization, and the elimination of social safety nets<sup>235</sup>—was a response to widespread economic crises, rather than a response to the arguments of economists. As Friedman ruefully observed:

For twenty-five years and more, I and others like me, preached the virtues of floating exchange rates. It had absolutely no effect on anybody. Nobody was persuaded by it. Until the brute force of events produced exchange crises. The Bretton-Woods fixed exchange rate system was obviously obsolete, it could not be maintained.<sup>236</sup>

But it was not until the elections of Thatcher in 1979 and Reagan in 1981 that neoliberalism came into its own.

Thatcher and Reagan championed the neoliberal belief in the supremacy of the free market. They cut taxes for businesses as well as individuals.<sup>237</sup> The extra money available to the wealthy would "trickle down" to those on the lower rungs of the economy, benefitting everyone. Despite the questionable logic of this proposition, it "created space for an acceptance of inequality as an essential part of economic growth and social progress."<sup>238</sup>

In addition, the public sector, especially social welfare programs, was slashed. Welfare, aid to families with dependent children, and health care benefits were all gutted or eliminated. Without such "incentives," it was argued, people would get jobs or start businesses.

233. DARDOT & LAVAL, *supra* note 228, at 142.

234. JONES, *supra* note 225, at 242–49.

235. *Id.* at 215–16.

236. *Id.* at 220; cf. HARVEY, *supra* note 20, at 57 ("The Thatcher phenomenon would surely not have arisen, let alone succeed, if it had not been for the serious crisis of capital accommodation during the 1970s.").

237. JONES, *supra* note 225, at 256, 263–65.

238. *Id.* at 264.

Reagan popularized the myth of the “Welfare Queen,” who was “black, decked out in furs, and driving her Cadillac to the welfare office to pick up her check.”<sup>239</sup>

The third major pillar of neoliberalism, related but distinct from the elimination of public sector support, is the privatization of the public sector. This refers to both the “outsourcing” of once-public functions, such as maintaining parks and prisons, to private companies, and the delegation of responsibility for dependents, including children, the elderly, and the disabled, to the family. If the family is unable to meet its responsibilities—if, for example, a single mother cannot afford daycare, and leaves her child alone or with an unsuitable caregiver—the child can be removed from her care.<sup>240</sup>

As Jones notes, this free market fundamentalism reflects a faith that “[e]fficiency can only be achieved through the incentives that are built into markets, which should therefore become the deliverer of all public systems as well as private companies . . . these basic ideas [have been] extended into international trade and development.”<sup>241</sup> The expectation was that global poverty would be reduced and eventually eliminated by economic growth through trade.<sup>242</sup> This approach became known as the Washington Consensus. As Kerry Rittich explains, the Washington Consensus assumes “that the implementation of efficiency enhancing rules is an uncontentious goal, that everyone stands to gain from free trade, that property and contract rights are the paramount legal entitlements, and that rule-based regimes ‘level the playing field’ and ensure fairness among otherwise unequal parties.”<sup>243</sup>

“Free trade,” i.e., the elimination of tariffs, quotas, and other barriers to trade, is a major component of the Washington Consensus. But trade liberalization does not make everyone better off. Rather, as

239. See Kathryn J. Edin & H. Luke Shaefer, *Ronald Reagan’s “Welfare Queen” Myth: How the Gipper Kickstarted the War on the Working Poor*, SALON (Sept. 27, 2015), [http://www.salon.com/2015/09/27/ronald\\_reagans\\_welfare\\_queen\\_myth\\_how\\_the\\_gipper\\_kickstarted\\_the\\_war\\_on\\_the\\_working\\_poor/](http://www.salon.com/2015/09/27/ronald_reagans_welfare_queen_myth_how_the_gipper_kickstarted_the_war_on_the_working_poor/) [<https://perma.cc/94FC-K3DA>] (archived Oct. 19, 2017) (noting that, “None of these stereotypes even came close to reflecting reality, particularly in regard to race.”); see also Josie Foehrenbach, Book Review, (reviewing FRANCES FOX PIVEN & RICHARD A. CLOWARD, *THE NEW CLASS WAR: REAGAN’S ATTACK ON THE WELFARE STATE AND ITS CONSEQUENCES*), 19 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 261–62 (1984) (describing Reagan’s attack on welfare state income maintenance programs as “one element of a comprehensive strategy designed to enlarge business profits and achieve a massive upward redistribution of income”).

240. Cf. *supra* Part I.A.1 (describing the removal of Indian children and black children from their families and communities).

241. JONES, *supra* note 225, at 332.

242. See ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 21–24 (2011).

243. Kerry Rittich, *Enchantments of Reason/Coercions of Law*, 57 U. MIAMI L. REV. 727, 739–40 (2003); see *Death of the Washington Consensus?*, WORLD ECONOMIC FORUM (Jan. 29, 2009) (summarizing a panel discussion at the World Economic Forum in Davos on the viability of the Washington Consensus given the economic recession).

Stiglitz points out, even when it makes “the country as a whole better off, it results in some groups being worse off.”<sup>244</sup> It has also been shown that free trade benefits developed states at the expense of developing states.<sup>245</sup>

### C. *The Great Recession and Global Capitalism*

Neoliberalism promised that globalization and capitalism would improve human well-being where badly managed and corrupt social welfare schemes had failed. This seemed plausible, if not entirely convincing, until the Great Recession in 2008. In 2007, the subprime mortgage market collapsed in the United States. Because lenders made their money from the fees generated by transactions, they had been encouraging unqualified buyers to assume mortgage obligations that they would never be able to pay off. Subprime lending was not that risky, it was thought, as long as the residential real estate market remained strong and housing costs continued to grow. By taking out low interest mortgage equity loans that enabled them to spend despite stagnant income, homeowners also invested in the bubble.<sup>246</sup>

The subprime mortgages themselves were sold to investment firms and repackaged. They were sliced and diced and rebundled into derivatives, complex securities created by investment banks and hedge funds.<sup>247</sup> Most of these “innovative” new instruments were unregulated and there was no legal obligation to secure them. When they failed, accordingly, there were no reserves backing them. When the United States housing bubble burst, the entire market tumbled. The bottom fell out, and once-venerable investment firms like Bear Sterns and Lehman Brothers collapsed. Markets panicked, triggering a global recession.

As Stiglitz explains in *Freefall*, the US economy constitutes such a large proportion of the global economy that when it dives, it takes the rest of the world with it.<sup>248</sup> In addition, the United States exported its recession because it had already exported its neoliberal philosophy of deregulation, privatization, and drastic cutbacks in social safety nets.<sup>249</sup> The Great Recession spread like wild fire because globalization had already eliminated the barriers that might have slowed it.<sup>250</sup>

244. JOSEPH STIGLITZ, MAKING GLOBALIZATION WORK 68 (2006).

245. *Id.* at 216; James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421 (2011) (noting that regional trade agreements follow suit).

246. JOSEPH STIGLITZ, FREEFALL 22 (2010).

247. *See supra* Part III.A (explaining how the complexity and sophistication of economic analysis became proof that it had to be left to the experts).

248. STIGLITZ, *supra* note 246.

249. *See, e.g.*, Joseph M. Schwartz, *Democracy Against the Free Market: The Enron Crisis and the Politics of Global Deregulation*, 35 CONN. L. REV. 1097 (2003).

250. Mark Weisbrot, *Globalization for Whom?*, 31 CORNELL INT'L L. J. 631 (1998).

Those in low-income states were especially vulnerable.<sup>251</sup> They were quickly hit by the collapse in global demand.<sup>252</sup> Remittances—which have always dwarfed foreign aid—from the United States and Europe dwindled.<sup>253</sup> The crises hit especially hard because social safety nets were already weakened by structural adjustment programs (SAPs) foisted on developing states by the IMF.<sup>254</sup>

The trickle-down of wealth promised by Hayek, Friedman, and Reagan has never reached those at the bottom. Most, in fact, stays at the top. As of January 2017, eight men own the same amount of wealth as the poorest half of the world.<sup>255</sup> Since 2015, the richest 1 percent has owned more wealth than everyone else combined.<sup>256</sup>

The most recent report from the World Bank shows a broad reduction in extreme poverty.<sup>257</sup> While there has been a small drop in the number of people living *below* USD 1 per day, however, “[t]he number of people living *between* \$1.25 and \$2 has almost doubled from 648 million to 1.18 billion between 1981 and 2008.”<sup>258</sup> As World Bank economists Shaohua Chen and Martin Ravallion put it, “there are more relatively poor people in a less absolutely-poor world.”<sup>259</sup>

251. STIGLITZ, *supra* note 246, at 23; *see also* Weisbrot, *supra* note 250 at 632 (“The Asian economic crisis also threw a wrench into the machinery of financial liberalization. The crisis opened a whole new debate over how to protect national economies from the instability caused by international capital flows. Even more importantly, the crisis has caused people to question the role of globalizing institutions, such as the IMF, in dealing with international economic problems.”).

252. STIGLITZ, *supra* note 246, at 23.

253. *Id.* at 24; Nicholas Kulish, *Somalis Face a Snag in Lifelines From Abroad*, N.Y. TIMES (Aug. 4, 2013), <http://www.nytimes.com/2013/08/04/world/africa/somalis-face-snag-in-lifeline-from-relatives-working-abroad.html> [<https://perma.cc/6B98-Q6SA>] (archived Oct. 19, 2017). Remittances were further reduced because the money transfer companies that enabled families to send money to keep their children in school were often the same companies that were used to send money to terrorist groups, such as the Shabab in Somalia. *Id.*

254. STIGLITZ, *supra* note 246, at 24.

255. DEBORAH HARDOON, AN ECONOMY FOR THE 99% 1 (2017), [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp-economy-for-99-percent-160117-en.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-economy-for-99-percent-160117-en.pdf) [<https://perma.cc/64RN-6RJE>] (archived Oct. 19, 2017). Income is similarly skewed. In 2015, for example, “the annual income of the world’s 50 wealthiest people was close to the total income of the poorest 1 billion.” Special Rapporteur Report, May 2015, *supra* note 222, at 14.

256. HARDOON, *supra* note 255, at 2.

257. Annie Lowrey, *Dire Poverty Falls Despite Global Slump, Report Finds*, N.Y. TIMES (Mar. 6, 2012), <http://www.nytimes.com/2012/03/07/world/extreme-poverty-down-despite-recession-world-bank-data-show.html> [<https://perma.cc/6RS9-DE9T>] (archived Oct. 19, 2017).

258. *Id.*; SHAOHUA CHEN & MARTIN RAVALLION, AN UPDATE TO THE WORLD BANK’S ESTIMATES OF CONSUMPTION POVERTY 1 (2012), [http://siteresources.worldbank.org/INTPOVCALNET/Resources/Global\\_Poverty\\_Update\\_2012\\_02-29-12.pdf](http://siteresources.worldbank.org/INTPOVCALNET/Resources/Global_Poverty_Update_2012_02-29-12.pdf) [<https://perma.cc/4XF5-XXW8>] (archived Oct. 19, 2017) (As the Bank notes, moreover, “[l]ags in data availability mean that 2008 is the most recent year we can make a reliable global estimate.”).

259. *Id.*

#### IV. WHEN GENEALOGY MATTERS

Genealogy matters in each of the contexts discussed above. It matters quite literally in adoption, when surrender by the biological parents is a legal prerequisite. It matters in human rights law, when “the soul of the human rights movement,” its legacy, and its future are at stake. It matters for neoliberalism, which has unleashed global capitalism, producing what the Chief Economist of the World Bank condemned in 2015 as “deep and pervasive inequality.”<sup>260</sup>

And genealogy matters as these contexts converge, as this final Part explains. Neoliberalism is ubiquitous, but it has failed almost all of us. Human rights, fragmented and stretched thin, have taken a hit. So has intercountry adoption, which has too often deteriorated into baby-selling, shaming states, and shunning by would-be adoptive parents.

Neoliberalism, human rights, and intercountry adoption all preceded global capitalism. Their early advocates didn’t see it coming. Friedman and Hayak were challenging the liberal social welfare policies of FDR and Atlee;<sup>261</sup> they didn’t want sweatshops, child labor, and choking pollution. Reagan and Thatcher championed “free markets,” but they didn’t mean free markets in *human beings*; they would have been horrified by human trafficking.<sup>262</sup> Pearl S. Buck and the Holts wanted to rescue children from the chaos of war; they wanted to eradicate baby-selling, not institutionalize it. Those who championed human rights dreamed of a “world made new,” not the “‘freedom’ to drink Pepsi instead of Coke.”<sup>263</sup> But neoliberalism, human rights, and intercountry adoption also contributed to the spread of global capitalism. They made it tolerable, if not palatable, at least for some.

##### A. The Ubiquity (and Failure) of Neoliberalism

##### 1. The Ubiquity of Neoliberalism

As Professor Wendy Brown explains, neoliberalism is not just a set of economic policies or an ideology. Rather, it is a “normative order

260. Special Rapporteur Report, May 2015, *supra* note 222, at 14.

261. See Ian Burumba, *Exit Wounds*, N.Y. TIMES MAG., Dec. 4, 2016, at 38, 42 (“Britain’s postwar Labor government under Clement Attlee, which created free national health care, built better public housing, improved education and guaranteed other blessings of the welfare state. British working-class men who risked their lives for their country during the war expected no less.”); see also Barbara Stark, *After/word(s): ‘Violations of Human Dignity’ and Postmodern International Law*, 27 YALE J. INT’L L. 315, 325–26, n.70 (2002) (describing the marketing of ‘Freedom’ perfume).

262. See Alston, *supra* note 2.

263. PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM AND THE AMERICAN LEGAL MIND 47 (1996).

of reasoning developed over three decades into a widely and deeply disseminated rationality, [that] transmogrifies every human domain and endeavor, along with humans themselves.”<sup>264</sup> She offers “college quality” as an example:

Older measures of college quality . . . are being rapidly supplanted by a host of new “best bang for the buck” rankings. . . . The algorithms may be complicated, but the cultural shift is plain: replacing measures of educational quality are metrics oriented entirely to return on investment (ROI) and centered on what kind of job placement and income enhancement student investors may expect from any given institution.<sup>265</sup>

Teachers, Brown notes elsewhere, “are ever more judged by our capacity to directly augment the value of our students as specks of human capital.”<sup>266</sup> It is not just that “education” is a commodity; students and teachers are commodities, too.

#### a. How Neoliberalism Transmogrifies Human Rights

Human rights have also been transmogrified.<sup>267</sup> Economic rights have been replaced by the promises of neoliberals at home and the Washington Consensus abroad.<sup>268</sup> Civil and political rights, similarly, have been eclipsed. The equation of “freedom” with “free markets” is just the beginning. In her line-by-line analysis of President Obama’s second inaugural address, Brown notes that “every progressive value—from decreasing domestic violence to slowing climate change”—is lauded as “driving” economic growth.<sup>269</sup> Human rights have become the *means* to strong markets.

264. WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* 9 (2015). Brown is drawing on Foucault here, for the notion of “normative reason” as an “[ascendant] governing rationality” that imposes “economic values, practices and metrics on every dimension of human life.” SCHLAG, *supra* note 263.

265. Brown, *supra* note 264 at 23.

266. Wendy Brown, *Political Theory is Not a Luxury: A Response to Timothy Kaufman-Osborne “Political Theory as a Profession”*, 63 POL. RES. Q. 680, 682 (2010).

267. *Id.* The Merriam Webster online dictionary defines ‘transmogrify’ as “transform, metamorphose” and offers an apt example: “transformed a small company into a corporate giant.” *Transmogrify*, MERRIAM WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/transmogrify> [https://perma.cc/EEL9-6MKY] (archived Nov. 7, 2017).

268. See *supra* Parts II.B.1 (describing the eclipse of economic rights by the wealth produced by global free markets); III.B (describing the popularity of Reagan and Thatcher’s ‘trickle-down’ economics).

269. BROWN, *supra* note 264, at 25 (quoting Obama, “A growing economy that creates good, middle-class jobs . . . [is] the North Star that guides our efforts”); see also Ileana Porras, *Binge Development in the Age of Fear: Scarcity, Consumption, Inequality, and the Environment at Crisis*, in *INTERNATIONAL LAW AND ITS DISCONTENTS* 25 (Barbara Stark ed., 2015).



Human rights have been useful to neoliberalism.<sup>270</sup> Naomi Klein, like Moyn, traces the human rights movement “as we know it today” to the 1970s.<sup>271</sup> Like Moyn, Klein stresses the movement’s “non-political creed.”<sup>272</sup> Unlike Moyn, Klein focuses on “the rise in that period of the neoliberal version of ‘private’ capitalism, with its now familiar policy prescription of privatization, deregulation and state retreat from social provision.”<sup>273</sup> As Professor Marks explains:

[P]art of the context for the consolidation of neo-liberalism itself was the emergence of the human rights movement, with its non-political creed. For where the effects of neo-liberal reconstruction began to bite, activists confined their criticism to the denunciation of abuses, leaving unchallenged the conditions in which those abuses had become possible and even, in some sense, rational.<sup>274</sup>

The particular iteration of the human rights movement that Moyn and Klein discuss, in short, helped make neoliberalism possible.<sup>275</sup>

#### b. How Neoliberalism Transmogrifies Intercountry Adoption

Neoliberalism promised to generate prosperity; new businesses would be spurred by an influx of Western cash. In countries where the annual income is USD 800, however, Western agencies offering fifty dollars for “facilitating” adoptions or as “finders’ fees”<sup>276</sup> promoted baby-selling.<sup>277</sup> The local people urging their friends or cousins to surrender their babies for cash to feed the others were “entrepreneurs.”

270. See *supra* Part III.A.

271. Marks, *Four Myths*, *supra* note 24, at 8.

272. *Id.*

273. *Id.*

274. *Id.* at 9.

275. Samuel Moyn, *On the Genealogy of Morals*, THE NATION (Mar. 28, 2007), <https://www.thenation.com/article/genealogy-morals/> [<https://perma.cc/G8WU-TTMM>] (archived Oct. 22, 2017). Moyn does not share Klein’s (or Marks’s) conclusions. Elsewhere, he dismisses “Marxists who see in human rights nothing but a rhetoric that makes the cage of globalizing neoliberalism more bearable.”

276. See Graff, *supra* note 126 (noting these fees, modest by Western standards, “induce local officials or bureaucrats to engage in dubious practices,” which is not a new observation); see, e.g., Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 60 (1987) (“Adoption agencies charge fees, often stiff ones, to adoptive parents, and part of the agencies’ fee income goes to pay the medical expenses and other maintenance expenses of the natural mother; thus, the adoptive parents pay the natural mother, albeit indirectly and at a regulated price, to give up her child. In ‘independent’ adoptions, which are arranged through a lawyer or obstetrician, the element of sale is even more transparent . . . .”); see also Robert S. Gordon, *The New Chinese Export: Orphaned Children—An Overview of Adopting Children from China*, 10 TRANSNAT’L L. 121 (1997) (stating that babies similarly have been viewed as exports).

277. Graff, *supra* note 126 (suggesting that the Hague Adoption Convention would curtail such practices). *But see* Smolin, *supra* note 14 (denouncing the Hague Adoption Convention “[as the codification of a] privatized, financially-monetized method of adoption”). In 2010, I was asked by the State Department to give a workshop on the Hague Adoption Convention to a group of about twenty “adoption professionals” from

Professor Marianne Blair has documented widespread trafficking in sending countries, including Cambodia, Guatemala, Nepal, Vietnam, India,<sup>278</sup> and, on a smaller scale, in Haiti, Sierra Leone, Congo, and Uganda.<sup>279</sup> In addition, there have been allegations of corruption in China, Russia, and South Korea.<sup>280</sup> Some of these cases involved agencies lying to parents, telling them, for example, that their children would be educated in America and would send for their parents when they were older.<sup>281</sup> In other cases, children were simply abducted.<sup>282</sup> Programs were shut down, or put on hold, or other states imposed moratoria, refusing to accept children from states that did not comply with the Hague Convention.<sup>283</sup>

At their peak, however, intercountry adoptions also helped legitimate neoliberalism and the globalization of capitalism. Briggs describes the political rhetoric when adoptive parents were welcome in Latin America:

Latin America did not need development, or access to birth control—which the Christian Right redefined as cultural imperialism—it needed strong markets, relief from the burden of providing social welfare measures . . . and the ability to send impoverished infants to families in the United States who could care for them. Adoption was indispensable to the neoliberal economic and political order.<sup>284</sup>

Intercountry adoption reassured Americans. We could rescue at least a few of the most vulnerable. We could take responsibility for saving children from terrible hardships, even as we avoided responsibility for the larger economic and political factors that led to their surrender.<sup>285</sup>

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Kazakhstan. At the end of the workshop I asked if there were any questions. There was just one: “How much can you charge before it’s ‘baby-selling’?”

278. Blair, *supra* note 15, at 355–65 (describing a shack in Cambodia with a handwritten sign, ‘Orphanage,’ and babies lying in their own waste in rusty cribs).

279. *Id.* at 365–72.

280. *Id.*

281. *Id.*

282. MARIANNE BLAIR ET AL., *FAMILY LAW IN THE WORLD COMMUNITY* 824 (3rd ed. 2015).

283. Termination was often abrupt, leaving would-be adoptive parents in limbo. See, e.g., Rachel L. Swarns, *A Family for a Few Days a Year*, N.Y. TIMES, Dec. 8, 2012 (describing the Carrs, who traveled nine times to Guatemala, trying to expedite the adoption of Geovany, who they met as a toddler). Several states objected to Guatemala’s accession to the Hague Convention on the ground that it was unable to comply with its requirements. See Guatemala at Adoption Convention Status Report, Table (noting objections of five states), <http://www.hcch.net/en/instruments/status-table> [<https://perma.cc/W224-KDN9>] (archived Jan. 12, 2018).

284. BRIGGS, *supra* note 3, at 5.

285. See *supra* Part III (describing the responsibility of United States investment banks and hedge funds for the Great Recession, and its impact on the global south).

## 2. Neoliberalism's Failure

If the goal of neoliberalism were to restore class power to the top 1 percent of the population, as Harvey maintains, it has been remarkably successful.<sup>286</sup> If, however, the goal was to assure broader social goods, as Friedman promised, neoliberalism has conspicuously failed. Instead, as Christine Lagarde, the Managing Director of the International Monetary Fund (IMF), recently noted, "There has been a staggering rise in inequality—7 out of 10 people in the world today live in countries where inequality has increased over the last three decades. And yet, we know that excessive inequality saps growth, inhibits inclusion, and undermines trust and social capital."<sup>287</sup> This is not carefully-calibrated, Rawlsian inequality, acceptable because the worst off would be even worse off without it.<sup>288</sup> Rather, as the Special Rapporteur on Extreme Poverty points out, "[T]he most impoverished suffer the most extreme effects of inequality."<sup>289</sup>

Children—everywhere—are disproportionately represented in this group.<sup>290</sup> Children make up nearly half of the almost 900 million people living on less than USD 1.90 day.<sup>291</sup> Ten million of the 21 million people who have been forcibly displaced from their homes are children.<sup>292</sup> Fifty-eight million children between ages six and eleven are out of school.<sup>293</sup> Fifty-two percent of them are girls.<sup>294</sup>

286. HARVEY, *supra* note 20, at 15–18 (drawing on the analyses of data by Gérard Duménil and Dominique Lévy, charting the "extraordinary concentrations of wealth and power emerging all over the place." *Id.* at 17.); Naomi Klein on Trump Election: "This Is a Corporate Coup d'État," DEMOCRACY NOW! (Jan. 20, 2017), [https://www.democracynow.org/2017/1/20/naomi\\_klein\\_on\\_trump\\_election\\_this](https://www.democracynow.org/2017/1/20/naomi_klein_on_trump_election_this) [<https://perma.cc/J38A-XUDZ>] (archived Oct. 22, 2017) (calling the Trump election a "corporate coup d'etat" and noting that the appointment of Rex Tillerson, former CEO of Exxon, as Secretary of State was just "cut[ting] out the middleman" in an interview with Lee Fang).

287. Christine Lagarde, Managing Dir., Int'l Monetary Fund, Address at the IMF Joint Annual Discussion: The IMF at 70: Making the Right Choices—Yesterday, Today, and Tomorrow 3 (Oct. 10, 2014), [www.imf.org/external/am/2014/speeches/pr02e.pdf](http://www.imf.org/external/am/2014/speeches/pr02e.pdf) [<https://perma.cc/85VD-9MRY>] (archived Oct. 22, 2017) (cited in Special Rapporteur, May 2015, *supra* note 222 at 13).

288. See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 42–43 (2001) (According to Rawl's 'difference principle', social and economic inequalities require two conditions: 1) fair equality of opportunity; and 2) they must be to the greatest benefit of the least-advantaged members of society).

289. Special Rapporteur, May 2015, *supra* note 222, at 12.

290. Alston, *supra* note 174, at 532.

291. UNICEF, STATE OF THE WORLD'S CHILDREN 72 (2016), <https://www.unicef.org/sowc2016/> [<https://perma.cc/Y2CV-ER4S>] (archived Oct. 22, 2017).

292. *Id.*

293. UNICEF, FIXING THE BROKEN PROMISE OF EDUCATION FOR ALL 23 (2016), [https://www.unicef.org/education/files/allinschool.org\\_wp-content\\_uploads\\_2015\\_01\\_Fixing-the-Broken-Promise-of-Education-For-All-full-report.pdf](https://www.unicef.org/education/files/allinschool.org_wp-content_uploads_2015_01_Fixing-the-Broken-Promise-of-Education-For-All-full-report.pdf) [<https://perma.cc/KZB7-LNZ5>] (archived Dec. 24, 2017).

294. *Id.* at 25.

Neoliberalism is not going to help them. Growth so robust that everyone will enjoy its benefits is a fantasy. In fact, trade is no longer rising.<sup>295</sup> As recent research confirms, even in the United States those on the bottom half of the income ladder “ha[ve] been completely shut off from economic growth since the 1970s.”<sup>296</sup> Families, trying to keep up with capital that crosses continents at the stroke of a key, are already dispersed. Social safety nets have already been slashed. The vulnerable—those too young, too old, disabled, uneducated, sick, weak, or unlucky—are on their own. As Professor Martha Fineman has shown, moreover, we are all vulnerable, sooner or later.<sup>297</sup>

### B. *The Decline of Intercountry Adoption*

Intercountry adoptions have plummeted. Numbers increased steadily since the end of the Cold War, peaking in 2004, when roughly forty-five thousand babies were adopted internationally, half of whom came to the United States.<sup>298</sup> By 2015, international adoptions were down to 5,648;<sup>299</sup> Americans adopted the lowest number since 1982.<sup>300</sup> Some would-be parents may have been deterred by the moratoria

295. See, e.g., Binyamin Appelbaum, *Little-Noticed Trade Fact: It's No Longer Rising*, N.Y. TIMES (Oct. 31, 2016), <https://www.nytimes.com/2016/10/31/upshot/a-little-noticed-fact-about-trade-its-no-longer-rising.html> [<https://perma.cc/2VSA-BYUJ>] (archived Oct. 22, 2017) (“The volume of global trade was flat in the first quarter of 2016, then fell by 0.8 percent in the second quarter. . . . Through the first nine months of 2016, trade fell by an additional \$470 billion.”); Peter S. Goodman & James Kanter, *Globalization Grinds to a Halt*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/business/international/european-union-canada-trade-agreement-ceta.html> [<https://perma.cc/GLJ4-4DPZ>] (archived Oct. 22, 2017) (“Liberalized trade has amplified economic growth, but the spoils have been largely monopolized by wealthy and corporate interests. Recriminations over the resulting economic inequalities are now so ferocious that modern history has been altered: the phase of globalization that began with the ending of world War II is essentially over.”).

296. Patricia Cohen, *A Bigger Pie, But Uneven Slices*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/06/business/economy/a-bigger-economic-pie-but-a-smaller-slice-for-half-of-the-us.html> [<https://perma.cc/L3N5-3HYJ>] (archived Oct. 22, 2017) (Findings by economists Thomas Piketty, Emmanuel Saez, and Gabriel Zucman show that despite small increases in public programs, inequality has soared. The income of the lower half remains roughly \$16,000; the top 1% averages \$1,304,800, 81 times as much).

297. See *Universal vulnerability should inform public policy*, EMORY L. NEWS CTR. (Sept. 24, 2014), <http://law.emory.edu/news-center/releases/2014/09/insights-fineman-universal-vulnerability.html#We0AKRNSxsM> [<https://perma.cc/KP4B-EQT9>] (archived Oct. 22, 2017) (stating that Professor Fineman has demonstrated this through a remarkable series of conferences and symposia under the auspices of the *Vulnerability and Human Condition Initiative*, which she founded in 2008 at Emory Law School).

298. BLAIR, *supra* note 282, at 803.

299. U.S. STATE DEPT., ANNUAL REPORT ON INTERCOUNTRY ADOPTION NARRATIVES 1 (2015).

300. Miriam Jordan, *Foreign Adoptions by American Drop to Lowest Level Since 1982*, WALL ST. J. (Apr. 1, 2015), <https://www.wsj.com/articles/foreign-adoptions-by-americans-drop-to-lowest-level-since-1982-1427837631> [<https://perma.cc/7S42-TRB7>] (archived Oct. 22, 2017).

described above which made it harder to find a child.<sup>301</sup> Others may have been deterred by widespread publicity about the same problems that triggered the moratoria; i.e., corruption, child abduction, and babies and families falling through the cracks.<sup>302</sup>

There are also other options, for those who can afford them. Gestational surrogacy, in which a fertilized egg is implanted in a woman whose job it is to carry the baby to term and give birth, is an increasingly appealing option for infertile couples and gay men.<sup>303</sup> The bans on commercial surrogacy enacted throughout Europe and China produced booming businesses in less regulated states, including Thailand and, until quite recently, India.<sup>304</sup>

For those seeking a baby, gestational surrogacy has several advantages over adoption. In market terms, it offers a better product, at a lower cost, with less risk.<sup>305</sup> Clinics screen surrogates and can

301. See *supra* Part IV.A.1.b.

302. See *supra* Part I.B.2; see, e.g., Sharon LaFraniere, *Officials in China Seized Infants for Black Market, Parents Say*, N.Y. TIMES (Aug. 5, 2011) <http://www.nytimes.com/2011/08/05/world/asia/05kidnapping.html> [https://perma.cc/EM8X-YKAU] (archived Oct. 22, 2017) (noting claims that babies were not abandoned but abducted by government officials in China.); Choe Sang-Hun, *Korean Mother Awaits Son's Deportation to Atone for Her 'Unforgivable Sin,'* N.Y. TIMES (Nov. 17, 2016), <https://www.nytimes.com/2016/11/17/world/asia/korea-adoption-adam-crapser.html?mtrref=www.google.com&gwh=4E47E901D2F0D8A977E638FC70BF657E&gwt=pay> [https://perma.cc/HJ2M-27VJ] (archived Oct. 22, 2017) (reporting that failure of adoptive parents to complete process for adoptive son's citizenship papers 40 years earlier resulted in his deportation). Adoption programs have also been shut down for political reasons. Russia halted adoptions by Americans in 2012, for example, to retaliate against a U.S. law barring Russians accused of violating human rights from traveling to the United States or owning real estate in the United States. See David M. Herszenhorn & Andrew Roth, *In Russia, Calls for a Halt to Adoptions by Americans*, N.Y. TIMES (Dec. 19 2012), <http://www.nytimes.com/2012/12/19/world/europe/russian-officials-call-for-ban-on-adoptions-by-us-citizens.html?mtrref=www.google.com> [https://perma.cc/HXL9-UCNJ] (archived Oct. 22, 2017); Andrew Roth, *Mother Asks Putin to Return 2<sup>nd</sup> Son After Death in Texas*, N.Y. TIMES (Feb. 21, 2013), <http://www.nytimes.com/2013/02/21/world/europe/russian-mother-of-adopted-boy-who-died-in-us-wants-his-brother-back.html?mtrref=www.google.com&gwh=03282BB7FEC18FEDD594BCEBEBDEA0EE&gwt=pay> [https://perma.cc/XAM9-3QNA] (archived Oct. 22, 2017).

303. See Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369 (2012).

304. See Arlie Hochschild, *Childbirth at the Global Crossroads*, AMERICAN PROSPECT (Sept. 19, 2009), <http://prospect.org/article/childbirth-global-crossroads-0> (last visited Mar. 13, 2012) [https://perma.cc/J97M-2246] (archived Oct. 22, 2017) (stating that bans are usually justified on the ground that surrogacy commodifies women and that surrogacy is banned in China, New York, and much of Europe); Hague Conference on Private Int'l Law, *Private International Law Issues surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements* 16, HCCH Doc. 11 (Mar. 11, 2011), <https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf> [https://perma.cc/2UU6-UXNF] (archived Dec. 24, 2017).

305. Nicole Grether & Adam May, *Going Global for a Family: Why International Surrogacy is Booming*, AL-JAZEERA AMERICA (May 13, 2014), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/12/going-global-forfamilywhyinternationalsurrogacyisbooming.html> [https://perma.cc/775Y-JXPZ] (archived Oct. 22, 2017).

assure prospective parents that they will not smoke, drink alcohol, or take any drugs that might adversely affect the baby. Parents can use their own sperm or egg or, if they prefer, choose from a selection of anonymous, but presumably well-screened, donors. Here again, genealogy matters.

For the surrogate, becoming pregnant, remaining pregnant, and complying with the restrictions imposed by the clinic, however onerous, may provide a rare opportunity. One Indian surrogate said that it would take her 10 years to earn what she could earn carrying one baby. Some might argue that she, too, has a “right” to benefit from globalization.<sup>306</sup> As Brown observes, however, “the promise of rights to enable the individual’s capacity to choose . . . doesn’t address the historical, political, and economic constraints in which this choice occurs—agency is defined as choice within these constraints and thus codifies them.”<sup>307</sup> These constraints may be particularly brutal in the context of profound inequality that characterizes international surrogacy.<sup>308</sup>

Professor Marks has written about the United Nations’ focus on the exploitation of vulnerable groups, from children sold as sex slaves to women sold as industrial workers.<sup>309</sup> Marks shows that exploitation is neither pathological nor anomalous. Rather, it is deeply embedded in capitalism. The conditions which breed trafficking also give rise to “voluntary” employment; exploitation is “not just a category of transnational crime, but . . . a branch of business.”<sup>310</sup> “Rights” can be bargained away. These kinds of transactions increase as inequality increases. Human rights, and the laws enacted to implement them, may restrain exploitation, but not if people are desperate, if they have no other options.<sup>311</sup> As long as unprecedented inequality persists, so will unprecedented exploitation.

306. See Ertman, *supra* note 26.

307. Wendy Brown, “*The Most We Can Hope for . . .*”: *Human Rights and the Politics of Fatalism*, 103 S. ATLANTIC Q. 452, 455 (2004).

308. See Karen Busby & Delaney Vun, *Revisiting the Handmaiden’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 44 (2009) (discussing where surrogates are not driven by economic desperation, but by the desire to help an otherwise childless couple, exploitation may not be an issue); Darlena Cunha, *The Hidden Costs of International Surrogacy*, THE ATLANTIC (Dec. 22, 2014), <https://www.theatlantic.com/business/archive/2014/12/the-hidden-costs-of-international-surrogacy/382757/> [https://perma.cc/N5QX-SADP] (archived Oct. 22, 2017) (describing the ‘devastation’ of the surrogate mother following the death of a premature infant).

309. Susan Marks, *Exploitation as an International Legal Concept*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING THE MARXIST LEGACIES 281, 301 (Susan Marks ed., 2008).

310. *Id.*

311. See INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 442 (Katarina Trimmings & Paul Beaumont eds., 2013) (arguing that regulation is necessary because a global ban would be impossible); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP.

Last year, in response to a petition by a lawyer to ban the use of Indian surrogates by foreigners, the Indian Supreme Court ordered the government to regulate surrogacy.<sup>312</sup> In October 2015, India, which had been the hub of international surrogacy, announced a complete ban on surrogacy for foreigners.<sup>313</sup>

### C. *The Limits and the Stubborn Appeal of Human Rights*

Human rights never promised utopia.<sup>314</sup> They have always been a more modest project; they only establish a floor. At the same time, human rights have proven to be remarkably resilient.

#### 1. The Limits of Human Rights

The limits of human rights are well known. Economic and social rights are rarely enforceable.<sup>315</sup> Nor is there any international pool, any common heritage, from which poor states may draw for the benefit

PROBS. 109, 146 (2009) (suggesting that “well-designed regulation can greatly mitigate most of the potential tangible harms of surrogacy,” at least in the domestic context). *But see* Marsha Garrison, *Law Making for Baby Making: an Interpretation Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 916 (2000) (noting that, however, surrogacy, unlike adoption, requires doctors, who are generally easier to regulate, because they want to remain licensed).

312. Joanna Sugden, *India Restricts Foreigners’ Access to Surrogate Mothers*, WALL ST. J. (Oct. 29, 2015), <https://www.wsj.com/articles/india-restricts-foreigners-access-to-surrogate-mothers-1446132042> [<https://perma.cc/7BT5-TF3Z>] (archived Oct. 22, 2017) (“India has increasingly restricted surrogacy. In 2012, the Home Ministry barred gay couples and single people from using Indian surrogates to have children, saying that only heterosexual couples married for more than two years would be given the visas required to do so.”); Murali Krishnan, *Will India cease to be a surrogacy hub?*, DEUTSCHE WELLE (Nov. 25, 2015), <http://www.dw.com/en/will-india-cease-to-be-a-surrogacy-hub/a-18874836> [<https://perma.cc/J3N8-DLRZ>] (archived Oct. 22, 2017); *No commercial surrogacy, only for needy Indian couples, Govt tells SC*, INDIAN EXPRESS NEWS SERVICE (Dec. 25, 2015), <http://indianexpress.com/article/india/india-news-india/govt-to-make-commercial-surrogacy-illegal-panel-to-decide-on-cases-of-infertile-couples/> [<https://perma.cc/HG6F-8MGW>] (archived Oct. 22, 2017) (“The government on Wednesday informed the Supreme Court that it does not support commercial surrogacy and that a proposed new law will allow ‘altruistic surrogacy’ to needy infertile married Indian couples and not foreigners.”).

313. Krishnan, *supra* note 312; *No commercial surrogacy, only for needy Indian couples, Govt tells SC*, *supra* note 312.

314. *See supra* Part II.

315. The South African Constitution is widely recognized for its explicit assurance of these rights and the South African Constitutional Court is similarly renowned for its willingness to uphold them. *See* JEANNE M. WOODS & HOPE LEWIS, *HUMAN RIGHTS AND THE GLOBAL MARKETPLACE* 715–80 (2005) (citing the Constitution and some of the landmark cases applying it). Yet too many black South Africans still live in squalor. Norimitsu Onishi, *South Africa, a Nation With Sharp Inequality, Considers a Minimum Wage*, N.Y. TIMES (Feb. 15, 2016), <https://www.nytimes.com/2017/02/15/world/africa/south-africa-minimum-wage.html> [<https://perma.cc/X3ZM-HFBB>] (archived Dec. 24, 2017) (noting that the official unemployment rate is 27% and that nearly half the population lives in poverty).

of their people.<sup>316</sup> Finally, as described in Part III, economic rights have been eclipsed by neoliberalism. An “adequate standard of living” is hardly worth struggling for (although billions, of course, do). Neoliberalism promised so much more.<sup>317</sup>

Civil and political rights, similarly, have lost much of their luster. As described above, they have been devalued by neoliberalism.<sup>318</sup> More recently, terrorist attacks in London, Paris, Brussels, Berlin,<sup>319</sup> and Boston have convinced some that an ongoing public emergency justifies restraints on civil liberties, especially those of immigrants and ethnic minorities.<sup>320</sup> The conflicts and chaos that followed the Arab spring made democracy look frightening. Racist demagogues make it look tawdry.<sup>321</sup>

## 2. Their Stubborn Appeal

Focusing on democracy, Professor Brown situates human rights in the postmodern context:

[M]ost have ceased to believe in the human capacity to craft and sustain a world that is humane, free, sustainable, and, above all, modestly under human control. This loss of conviction about the human capacity to craft and steer its existence or even to secure its future is the most profound and devastating sense in which

316. Rather, the IMF and the World Bank have contributed to a perverse trend in which money flows from the impoverished global South to the bloated global North. See Barbara Stark, *Jam Tomorrow: Distributive Justice and the Limits of International Economic Law*, 30 B. C. THIRD WORLD L. J. 4, 16–20 (2010); Barbara Stark, *How The Age of Rights Became The New Gilded Age*, 47 COLUM. HUM. RTS. L. REV. 151, 179–84 (2015).

317. See BROWN, *supra* note 269 (quoting President Obama).

318. See *supra* Part IV.A.1.a.

319. See Alison Smale, *Berlin Attack Poses Tough Test in Merkel's 11 Years in Power*, N.Y. TIMES (Dec. 21, 2016) <https://www.nytimes.com/2016/12/21/world/europe/berlin-attack-angela-merkel.html?mtrref=www.google.com&gwh=27902D9004E37BC258251E7AD36965D5&gwt=pay> [<https://perma.cc/KKB3-DVV9>] (archived Oct. 22, 2017); Liam Stack, *Deadly Berlin Christmas Market Episode Latest in Europe*, N.Y. TIMES (Dec. 20, 2016), <https://www.nytimes.com/2016/12/19/world/europe/europe-terror-attacks-2016.html?mtrref=www.google.com&gwh=332C379DB8EABFBB403B282100C72B86&gwt=pay> [<https://perma.cc/BWE3-W7TL>] (archived Oct. 22, 2017) (noting attacks in France and Belgium on city streets, nightclubs, and transit hubs, as well as attacks in Italy and Bavaria).

320. See Exec. Order No. 13,769, *Protecting the Nation From Foreign Terrorist Entry Into the U.S.*, 82 Fed. Reg. 8,977, which banned for 90 days the entry of individuals from seven countries. A TRO was issued by a federal District Court in Washington v. Trump, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), and was upheld in February by the Ninth Circuit Court of Appeals, Washington v. Trump, No. 17-35105 (9th Cir. 2017).

321. Alison Smale, *France's LePen Extols Far-Right Parties*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/21/world/europe/marine-le-pen-extols-far-right-during-speech-in-germany.html?mtrref=www.google.com&gwh=3B51E88A4A12360507121EB586D250F4&gwt=pay> [<https://perma.cc/C4JT-VANS>] (archived Oct. 22, 2017) (describing “far-right awakening in Europe in response, in part, to “a sense of lost identity . . . heightened by the arrival of waves of migrants”).



modernity is “over.” Neoliberalism’s perverse theology of markets rests on this land of scorched belief in the modern.<sup>322</sup>

Even if we are agnostic about our capacity to craft a “humane, free, sustainable world . . . modestly under human control,” it is now clear that markets don’t do any better.<sup>323</sup> Millions of people still think that their governments should do more than stay out of the market’s way, moreover, and they are determined to hold their governments accountable. They draw on the rich genealogies of human rights to do so, as shown by the “largest day of protests in U.S. history” following Donald Trump’s inauguration.<sup>324</sup>

The protests themselves were a remarkable demonstration of political expression: “This is what democracy looks like!” was a popular chant.<sup>325</sup> Even more remarkable was the protesters’ platform, released the week before the marches, which included calls for:

reforms to address . . . racial and economic inequality. It supports paid family leave; and . . . access to affordable reproductive health care, including

322. BROWN, *supra* note 266, at 221.

323. See *supra* Part IV.A.2.

324. Matt Broomfield, *Women’s March against Donald Trump is the largest day of protests in U.S. history, say political scientists*, CNN POLITICS (Jan. 25, 2017), <http://www.cnn.com/2017/01/21/politics/trump-women-march-on-washington/index.html> [https://perma.cc/SLV7-ZGTM] (archived Oct. 22, 2017) (citing data compiled by political scientists at the Universities of Connecticut and Denver, estimating between 3.3 million and 4.6 million protesters). Hundreds of “sister marches” took place around the world, including marches in Sydney, Berlin, Paris, Nairobi, and Cape Town. Laura Smith-Spark, *Protesters rally worldwide in solidarity with Washington march*, CNN POLITICS (Jan. 21, 2017), <http://www.cnn.com/2017/01/21/politics/trump-women-march-on-washington/index.html> [https://perma.cc/U5BP-X9VQ] (archived Dec. 24, 2017). The Trump presidency might unite progressives, providing a common focus or target, much as *Roe v. Wade* united conservatives. Professor Heather Gerken, Distinguished Scholar in Residence, Lecture at Hofstra Law School: Progressive Federalism (Feb. 8, 2017), [http://scholarlycommons.law.hofstra.edu/lectures\\_scholar\\_in\\_residence/5/](http://scholarlycommons.law.hofstra.edu/lectures_scholar_in_residence/5/) [https://perma.cc/E76U-KUUG] (archived Oct. 22, 2017); see Associated Press, *Ginsburg: Roe gave opponents target*, POLITICO (May 11, 2013), <http://www.politico.com/story/2013/05/ruth-bader-ginsburg-roe-v-wade-abortion-091218> [https://perma.cc/T2EY-DY7R] (archived Oct. 22, 2017).

325. Susan Chira & Yamiche Alcindor, *Defiant Yet Jubilant Voices Flood U.S. Cities*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/21/us/women-march-protest-president-trump.html?mtrref=www.google.com&gwh=145054CC4BF90F01C7F7B411FCC61556&gwt=pay> [https://perma.cc/KT5F-H6TW] (archived Oct. 22, 2017) (estimating 400,000 protestors in New York and at least half a million in Washington, many wearing pink hats with cats’ ears, referring to Trump’s crude remarks aired during the campaign). There is no human right to ‘democracy,’ it is protected by well-established civil and political rights, including rights of political participation described in *supra* Part II.B.2.b.

contraception and abortion; a living minimum wage; immigration reform, with a path to citizenship; and protection of the environment and public lands.<sup>326</sup>

Equality is at the core of human rights.<sup>327</sup> Family leave, reproductive health care, and a “living minimum wage,” similarly, are well-established socio-economic rights, even if they have rarely been recognized as “rights” in American jurisprudence.<sup>328</sup> But what began as Bismarck’s effort to preempt socialism has developed into a widely recognized framework for claiming the material necessities of life as *rights*, as legal entitlements.

The protesters’ demands were not the only recent demands for human rights. Rights-oriented lawyers have mobilized across the country.<sup>329</sup> As Anthony D. Romero, the executive director of the ACLU observed, “You’ve never seen it at this intensity and across all these different issues—freedom of speech, Muslim rights, immigrants’ rights, abortion rights. All the pots have been put on a boil.”<sup>330</sup>

These include demands for socio-economic rights. As the Special Rapporteur on Extreme Poverty has argued, “questions of resources and redistribution” must be “[put back] into the human rights equations.”<sup>331</sup> Some pragmatic leaders are finally reconsidering “austerity.” After Brexit, for example, the United Kingdom adopted a spending plan to help those who are “just about managing.”<sup>332</sup>

326. Opinion, *What the Women’s March Stands For*, N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/opinion/what-the-womens-march-stands-for.html?mtrref=www.google.com&gwh=5ADA0978EA305B0BC57E49D938572A4C&gwt=pay&assetType=opinion> [https://perma.cc/9TU6-FKZC] (archived Oct. 22, 2017). The platform also included calls for “an end to the use of military-style weapons and tactics by the police in minority communities . . . immigration reform, with a path to citizenship; and protection of the environment and public lands.” These resonate with human rights-based claims for ‘dignity’ and emerging, if problematic, claims for a healthy environment. See Porras, *supra* note 269.

327. See Stark, *How The Age of Rights Became The New Gilded Age*, *supra* note 316, at 158–59 (describing the historical significance of nondiscrimination law).

328. Rather, to the extent they have been assured, it has been in legislation, or state laws, that lacked the clout of federal constitutional rights. Barbara Stark, *Economic Rights in the U.S. and International Human Rights Law: Toward an “Entirely New Strategy,”* 44 HASTINGS L. J. 70 (1992) (describing economic rights recognized in state constitutions).

329. Charlie Savage, *Lawyers Join Forces and Fan Out to Fight Trump Policies*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/30/us/politics/lawyers-trump-travel-order.html?mtrref=www.google.com&gwh=26DA1D0883394FF45E4229AB52B52007&gwt=pay> [https://perma.cc/Q85M-M6JG] (archived Oct. 22, 2017).

330. *Id.*

331. Special Rapporteur, May 2015, *supra* note 222, at 19.

332. Stephen Castle, *U.K. Abandons Austerity in Aftermath of ‘Brexit’*, N.Y. TIMES (Nov. 24, 2016), <https://www.nytimes.com/2016/11/23/world/europe/uk-philip-hammond-autumn-statement-brexit.html?mtrref=www.google.com> [https://perma.cc/MA84-7XLP] (archived Oct. 22, 2017). A recent study of modern capitalism by four American academics, *How Big Should Our Government Be?*, concludes that, “A national instinct that small is always better than large government is grounded not in facts but rather in

Proposals abound for “small fixes,” successful experiments throughout the world, grounded in basic economic rights,<sup>333</sup> including the right to work.<sup>334</sup> Many focus on children,<sup>335</sup> not because they are an “investment” for our future, but because children themselves are rightholders. A recent proposal to give every child below the poverty line in America a check refers to “a floor below which no one is allowed to fall . . . one of the hallmarks of just about every [other] advanced nation.”<sup>336</sup>

## V. CONCLUSION: GENEALOGIES MATTER

This Article has traced genealogies of adoption, human rights, and neoliberalism. It has shown how stranger adoption was used as a private solution to the public problem of poor, non-conforming, non-white families, at little cost to the state.<sup>337</sup> It has described how adoption became “internationalized”<sup>338</sup> and how its purpose shifted, so

ideology and politics . . . [M]ore government can lead to greater security, enhanced opportunity and a fairer sharing of national wealth.” Eduardo Porter, *The Case for More Government and Higher Taxes*, N.Y. TIMES (Aug. 3, 2016), <https://www.nytimes.com/2016/08/03/business/economy/rethinking-the-role-of-government-in-society.html> [<https://perma.cc/PSS7-KMSE>] (archived Oct. 22, 2017).

333. JONATHAN TEPPERMAN, *THE FIX: HOW NATIONS SURVIVE AND THRIVE IN A WORLD IN DECLINE* (2016) (“Bolsa Familia [was] an innovative and relatively inexpensive cash transfer program that didn’t just give people handouts but required ‘counterpart responsibilities,’ including government demands to use some of the money to send one’s kids to school and ensure they are immunized.”).

334. See, e.g., Robert H. Frank, *Handouts With a Twist: Rebuilding America*, N.Y. TIMES (Nov. 13, 2016), <https://www.nytimes.com/2016/11/13/upshot/handouts-with-a-twist-rebuilding-americas-infrastructure.html?mtrref=www.google.com&gwh=97217D0FC1C0045A9FEA1BDC10EF3749&gwt=pay> [<https://perma.cc/B7PD-2KCG>] (archived Oct. 22, 2017) (linking “cash grants to repairing infrastructure.”); Peter S. Goodman, *Free Money for the Jobless*, N.Y. TIMES (Dec. 18, 2016), <https://www.nytimes.com/2016/12/17/business/economy/universal-basic-income-finland.html?mtrref=www.google.com&gwh=FD89C005B1CFD6A350602829A3E58550&gwt=pay> [<https://perma.cc/XK4N-UYJ9>] (archived Oct. 22, 2017) (describing a new experiment in Finland to assure basic income for those in otherwise risky tech jobs.).

335. See, e.g., Eduardo Porter, *Bold Strike Against Poverty: A Check for Every Child*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/19/business/economy/giving-every-child-a-monthly-check-for-an-even-start.html?mtrref=www.google.com&gwh=CBB4FECEB92E0694181F1E4385602188&gwt=pay> [<https://perma.cc/CCC5-RKVD>] (archived Oct. 22, 2017).

336. *Id.* The difference between the former neoliberal formulation (‘an investment’) and the latter (a right) is movingly shown in KAZUO ISHIGURO, *NEVER LET ME GO* (2005) (novel and film in which parentless children are raised in state-run boarding schools to become organ donors). Neoliberalism allows the exploitation of some for the benefit of others. See *supra* text accompanying footnotes 302–305. Human rights, grounded in the ‘dignity’ of every human being, forbid it.

337. See *supra* Part I.A.

338. See *supra* Part I.B.

that at its peak, “agencies were working not to find homes for needy children but to find children for Western homes.”<sup>339</sup>

While international adoption was grounded in stories of child rescue, international adoption law was grounded in the *cri de coeur* of communities from which children had been taken, including Jewish communities in Europe during World War II<sup>340</sup> and those who resisted the junta in Argentina during the “dirty wars.”<sup>341</sup> These claims drew on, and generated, human rights law.<sup>342</sup>

Part II explored the genealogies of human rights, from the conventional story of a “world of a made new”<sup>343</sup> to the “struggle for the soul of the human rights movement,” now underway.<sup>344</sup> It honed in on those human rights most important for adoptees—economic rights and children’s rights. It then explained how the child’s vulnerability, her reliance on others, was recognized in the first human rights instrument, the 1924 Declaration on the Rights of the Child.<sup>345</sup> The recent trend away from the early “welfarist” focus on caring for children, accordingly, is troubling. In the broader context of austerity, structural adjustment, and the destruction of social safety nets, children are not only among the first to suffer, but often the hardest hit.

As set out in Part III, the original neoliberals were not worried about these problems. They were worried that the social welfare programs of Atlee and FDR would stifle initiative and discourage hard work. Neoliberalism promised not just an “adequate standard of living,” but prosperity for all but the lazy. The Great Recession, along with an anemic recovery that left most of the world behind, has led to widespread skepticism, and a sharp critical focus on the social and political costs of growing inequality.

Part IV shows that genealogies illuminate, but what is revealed may be ugly. Neoliberalism is ubiquitous. But from the perspectives of almost all of the world’s children, from *any* perspective but that of the 1 percent, neoliberalism is a failure. It is a failure, moreover, because it violates human rights. Its deregulation dismantles the health and safety standards required by the ICESCR; its privatization purports to relieve the state of its responsibilities under the International Bill of Rights;<sup>346</sup> and its structural adjustment and austerity programs deny subsistence to those who need it most.

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339. See Graff, *supra* note 126.

340. See *supra* text accompanying footnotes 114–16.

341. See *supra* text accompanying footnotes 117–21.

342. See *supra* text accompanying footnote 120.

343. See *supra* text accompanying footnote 18.

344. See *supra* Part II.A.

345. See *supra* text accompanying footnote 78.

346. See *supra* text accompanying footnotes 139.

Neoliberalism unleashed global capitalism, with devastating consequences for most of humanity as well as the planet itself.<sup>347</sup> The genealogies traced here are genealogies of disillusionment. This is not necessarily bad. These are harsh stories, but they are useful. We are more skeptical about stories of child “rescue” now, because we know that they have often been the flip side of stories of parental and community loss.<sup>348</sup> We are more cynical than the generation that dreamed of “a world made new,” because we have seen how human rights have been used to make the world safe for capitalism. We reject the notion of market-driven prosperity for everyone, because we see who benefits, and who suffers.<sup>349</sup>

Human rights still have currency, especially those set out in the CRC—the most recent, comprehensive, and accepted major human rights instrument.<sup>350</sup> Human rights have been battered<sup>351</sup> and neglected,<sup>352</sup> but they are still our best guide toward a less brutal, less polarized, world. They remain a modest project. They promise only the hard, frustrating work of democracy, what Brown describes as “collaborative and contestatory human decision-making . . . planning for the future.”<sup>353</sup> But at least human rights put human well-being before corporate profits and global capitalism. Neither the Enlightenment “progress narrative”<sup>354</sup> nor the neoliberal market<sup>355</sup> assures a trajectory toward a better tomorrow. We can only rely on ourselves, and each other.

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347. See, e.g., Porras, *supra* note 269.

348. See *supra* Parts I.A.1., I.A.2.

349. See *supra* Part IV.A.2.

350. As noted above, the CRC includes socio-economic as well as civil and political rights. It has been ratified by every country except the United States. See *supra* Part II.B.2.

351. See *supra* Part IV.A.1.a.

352. See *supra* Part II.B.1.b.

353. BROWN, *supra* note 266.

354. See *supra* text accompanying footnote 162.

355. See *supra* text accompanying footnotes 234–36.